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Supreme Court of the United States

OCTOBER TERM, 1962

No. 68

NATHANIEL WRIGHT, ET AL., PETITIONERS,

vs.

GEORGIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED FEBRUARY 17, 1962
CERTIORARI GRANTED JUNE 25, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 68

NATHANIEL WRIGHT, ET AL., PETITIONERS,

vs.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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[fol. 1]

IN THE SUPREME COURT OF GEORGIA

GEORGIA)
CHATHAM COUNTY)

TO THE PRESENT TERM OF THE SUPREME COURT OF GEORGIA

NATHANIEL WRIGHT,
CHARLES L. SMART,
ROSCO WHITE,
JAMES W. THOMAS,
BENJAMIN CARTER and
JUDSON FORD,

Plaintiffs-In-Error

—against—

STATE OF GEORGIA

Defendant-In-Error

IN ERROR FROM THE CITY COURT OF SAVANNAH, GEORGIA.

In which the case is entitled.

STATE OF GEORGIA

—against—

NATHANIEL WRIGHT,
CHARLES L. SMART,
ROSCO WHITE,
JAMES W. THOMAS,
BENJAMIN CARTER, and
JUDSON FORD

BILL OF EXCEPTIONS

Now Comes, Nathaniel Wright, Charles L. Smart, Rosco White, James W. Thomas, Benjamin Carter and Judson Ford, as Plaintiffs-in-error, and file this their Bill of Exceptions in which the State of Georgia is the Defendant-in-error.

Be It Remembered that, Plaintiffs-in-error were brought up for trial in the City of Savannah, Georgia, Honorable Columbus E. Alexander, Judge, Presiding, on the 18th day of May, 1961, said Plaintiffs-in-error being charged with violation of Section 26-5301 of the Code of Georgia.

Be It Further Remembered that, the trial of said case proceeded and a Jury was stricken. However, before arraignment and before pleading to the accusation therein, Plaintiffs-in-error filed a General Demurrer to said accusation upon the grounds that the Statute upon which it was based, to-wit: Section 26-5301 of the Code of Georgia, was unconstitutional. The General Demurrer was overruled by Honorable Columbus E. Alexander, Judge, presid-

ing. Evidence was then introduced by the State at the [fol. 2] close of which Counsel for the Defendants made a Motion to Acquit. After argument of Counsel in the absence of the Jury, the Motion to Acquit was overruled by Honorable Columbus E. Alexander, Judge, Presiding. The Jury was recalled and after argument of Counsel and the charge of the Court in said case, the Jury returned a verdict of guilty, whereupon The Honorable Columbus E. Alexander, Judge of said Court, sentenced each Defendant to pay a fine of $100.00 or serve five months under the jurisdiction of the State Board of Corrections, with the exception of Defendant, Nathaniel Wright who was sentenced to pay a fine of $125.00 or serve six months under the jurisdiction of the State Board of Corrections.

Be It Further Remembered that, within the time prescribed by Law, and on the 23rd day of May, 1961, Defendants duly filed their Motions for New Trial, which case was regularly set down for hearing on the 23rd of June, 1961. The Honorable Columbus E. Alexander, Judge, presiding, continued the Hearing on said Motion until the 21st day of July, 1961, at which time said Motion for New Trial and Brief of Evidence was submitted to the Court without argument of Counsel. Said Motions for New Trial were considered by the Court and on the 24th day of July, 1961, the Honorable Columbus E. Alexander, Judge of said Court, entered an Order overruling said Motions for New Trial on each and every ground. On the 17th day of August, 1961, the Honorable Columbus E. Alexander, Judge of said Court, issued an Order permitting the cases of Plaintiffs-in-error to be consolidated as said cases were predicated upon identical circumstances and facts and involved the same defensive pleas and the same questions of Law.

Plaintiffs-in-error make the following assignments of Error:

[fol. 3] 1. Plaintiffs-in-error in due time filed the following General Demurrer to the accusations:

"GENERAL DEMURRERS

NOW COMES the Defendants in the above named and stated case and before arraignment and before pleading to the accusation therein, and demur thereto, and for grounds of demurrer, say:

1. These Defendants demur to said accusation upon the ground that the Statute upon which said accusation is based and under which Defendants, all being Negroes, were arrested and charged, to-wit: Section 26-5301 of the Code of Georgia, "ANY TWO OR MORE PERSONS WHO SHALL ASSEMBLE FOR THE PURPOSE OF DISTURBING THE PUBLIC PEACE OR COMMITTING ANY UNLAWFUL ACT, AND SHALL NOT DISPERSE ON BEING COMMANDED TO DO SO BY A JUDGE, JUSTICE, SHERIFF, CONSTABLE, CORONER OR OTHER PEACE OFFICER, SHALL BE GUILTY OF A MISDEMEANOR", is so vague that Defendants are not put on notice as to what criminal act they have allegedly committed, rendering it impossible to answer the charge or make a legal defense, thus denying to Defendants due process of Law secured to them by the Fourteenth Amendment to the United States Constitution.

2. These Defendants demur to said accusation upon the ground that the Statute upon which said accusation is based and under which Defendants, all being Negroes, were arrested and charged, to-wit: Section 26-5301 of the Code of Georgia, as set out in "Paragraph 1" above, is unconstitutional in that said Statute is unconscionably vague in that nowhere in said Statute does there appear a definition of disturbing the public peace or committing any unlawful act. The absence of definition of these terms in sufficient specificity denies due process of Law guaranteed [fol. 4] by the Fourteenth Amendment to the United States Constitution and the Constitution of the State of Georgia.

3. These Defendants demur to said accusation upon the ground that the Statute upon which said accusation is based and under which Defendants, all being Negroes, were arrested and charged, to-wit: Section 26-5301 of the Code of Georgia, as set out in "Paragraph 1" above, is uncon-

stitutional as applied to these Defendants to enforce racial discrimination with respect to municipally owned recreational facilities, in that any Statute so used is unconstitutional as applied, because the Fourteenth Amendment to the United States Constitution requires that no State shall make any discrimination based on race with respect to governmentally owned facilities.

4. These Defendants demur to said accusation upon the ground that the arrest of said Defendants under Section 26-5301 of the Code of Georgia, as set out in "Paragraph 1" above, was in fact pursuant to the policy, custom and usage of the State of Georgia, which compels segregation of races in municipally owned places of public recreation contrary to the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

5. These Defendants demur to said accusation on the ground that the Statute upon which said accusation is based and under which Defendants, all being Negroes, were arrested and charged, to-wit: Section 26-5301 of the Code of Georgia, as set out in "Paragraph 1" above, vests in said Judge, Justice, Sheriff, Constable, Coroner or any other peace officer, the untramelled and arbitrary authority to predetermine the commission or the intent to commit an offense under said Statute. Defendants under said Statute are not apprized of what acts or act they are forbidden to [fol. 5] commit, said determination being left solely to the discretion of the said peace officer. Said Statute is therefore so vague, capricious, arbitrary and unreasonable as to violate the due process clause of the Fourteenth Amendment to the United States Constitution.

These Defendants pray that each and all of the foregoing grounds of demurrer be examined into by the Court and that said accusation be quashed upon each and all of said grounds."

The Honorable Columbus E. Alexander, Judge, presiding, overruled said General Demurrers upon each and every ground, to which ruling Plaintiffs-in-error excepted, now except and assign the same as error upon the ground that it was contrary to Law.

2. At the close of the State's evidence, Plaintiffs-in-error made the following Motion to Dismiss:

Motion

Mr. Gadsden: I would like to make a Motion for Acquittal, Your Honor, based on this Georgia Statute, Section 26-5301; a Statute which prohibits "Unlawful Assembly" for the purpose of disturbing the public peace. The State has not established the fact that they assembled there for the purpose of disturbing the public peace or for committing any unlawful act; the only evidence in this case is that they were there for the purpose of playing basketball, the State's own witness show that, and it is not within the purview of this Statute to have a conviction when it doesn't meet all of the terms and elements of the Law. There is no evidence here before this Court and Jury that the Defendants went, there for the purpose of disturbing the public peace other than circumstantial evidence, and our position is that when circumstantial evi-
[fol. 6] dence is relied upon to convict a person it must have no other reasonable explanation than the one upon which the State is relying. Now if the State is basing its case upon the fact that these Defendants went there for the purpose of disturbing the public peace the only evidence it has to sustain that is the fact that they had on ordinary clothing, and as far as I can determine from the evidence here today that is all they have to show an attempt to disturb the public peace, and there is no other offense involved whatsoever. The only evidence before this Court today is that these Defendants went there to play basketball and that they played basketball until stopped by the police officers, and that is the reason why we are asking this Court to direct a verdict for acquittal in this case; the State has failed to carry the burden in that respect.

It is a question of "Intent" and, certainly, there is no evidence as to their intent. All of the evidence they have is circumstantial, and I think that the Law is settled on the fact that where there is circumstantial evidence, and when there are two different conclusions, this, certainly, cannot be used to sustain a conviction and, therefore, we

respectfully ask this Court to direct a verdict of acquittal in this case.

Judge: Motion for directed verdict overruled.

The Honorable Columbus E. Alexander, Judge, presiding, overruled said Motion to Dismiss, to which ruling Plaintiffs-in-error excepted, now except and assign the same as error upon the ground that it was contrary to Law, and that the same should have been granted because the evidence revealed that no crime had been committed by the Plaintiffs-in-error.

3. Plaintiffs-in-error, as hereinabove set out, filed Motions of New Trial on the 23rd day of May, 1961, and on the [fol. 7] 24th day of July, 1961, the Honorable Columbus E. Alexander, Judge of said Court, overruled said Motions on each and every ground, therein stated, to which ruling Plaintiffs-in-error excepted, now except and assign the same as error upon the ground that it was contrary to Law.

4. The Honorable Columbus E. Alexander, Judge, presiding, at the trial of said case, sentenced each Defendant to pay a fine of $100.00 or serve five months under the jurisdiction of the State Board of Corrections with the exception of Defendant, Nathaniel Wright who was sentenced to pay a fine of $125.00 or serve six months under the jurisdiction of the State Board of Corrections, to which judgment Plaintiffs-in-error excepted, now except and assign the same as error upon the ground that it was contrary to Law.

Plaintiffs-in-error specify, as being material to a clear understanding of the errors complained of, the following portions of the record:

1. Accusation Number 21074 together with all entries thereon together with the pleas of Not Guilty.

2. The verdict of the Jury together with the judgment and sentence of the Court signed by the Honorable Columbus E. Alexander, Judge, then presiding, dated May 23, 1961.

3. General Demurrers filed by Plaintiffs-in-error before arraignment and before pleading to the accusations, together with the rulings of the Court thereon.

4. The Motion to Dismiss submitted at the close of the State's evidence and the ruling of Court thereon, as set out in *Rulings of the Court* approved by Honorable Columbus E. Alexander, Judge, then presiding.

5. Motions for New Trial filed by Plaintiffs-in-error, [fol. 8] Order continuing said Motion, dated and filed on the 21st day of June, 1961. An order overruling said Motions for New Trial, dated and filed on the 24th day of July, 1961, and signed by Honorable Columbus E. Alexander, Judge of the City Court of Savannah, Georgia.

6. The Brief of Evidence and Approval of said Brief of Evidence by Honorable Columbus E. Alexander, Judge, then presiding, filed on the 24th day of July, 1961.

7. Order permitting consolidation of said cases, signed by Honorable Columbus E. Alexander, Judge, presiding, dated and filed on the 17th day of August, 1961.

And Now Comes the Plaintiffs-in-error, within the time provided by Law and, assigning error on all the rulings complained of as being contrary to Law, tender this their Bill of Exceptions and pray that the same be certified as true and transmitted to the Supreme Court of the State of Georgia, in order that the alleged errors be considered and corrected, all as provided by Law.

The Supreme Court of Georgia, and not the Court of Appeals, has jurisdiction of this Bill of Exceptions, for the reason that the same involves the constitutionality of a statute of the State of Georgia.

Plaintiffs-in-error most respectfully submit their Bill of Exceptions.

/s/ E. H. Gadsden, B. Clarence Mayfield, Attorneys for Plaintiffs-In-Error, 458½ West Broad Street, Savannah, Georgia.

[fol. 9]

Judge's Certificate to Bill of Exceptions

I do certify that the foregoing Bill of Exceptions is true and contains all of the evidence and specifies all of the record material to clear understanding of the errors complained of, and The Clerk of the City Court of Savannah,

Chatham County, Georgia, is hereby directed to make out a complete copy of such portions of the record as are in this Bill of Exceptions specified, and certify them as such, and cause them to be transmitted to the Present Term of the Supreme Court of Georgia, in order that the errors alleged to have been committed may be considered and corrected.

This 18th day of August, 1961.

/s/ COLUMBUS E. ALEXANDER, Judge, City Court of Savannah, Chatham County, Georgia.

[fol. 15]

IN THE CITY COURT OF SAVANNAH, GEORGIA

ACCUSATION AND ENDORSEMENTS THEREON

State of Georgia)
County of Chatham)
City of Savannah)

And now on this 28th day of April in the year of our Lord one thousand nine hundred and sixty-one comes Andrew J. Ryan, Jr., Solicitor General of the Eastern Judicial Circuit of Georgia, who prosecutes for the State of Georgia, in the City Court of Savannah, and by accusation made on oath, and in accordance with the statutes in such cases made and provided, in the name and behalf of the Citizens of Georgia, charges and accuses Benjamin Carter, James W. Thomas, (~~Gavon M. King~~), Roscoe White, Charlie L. Smart and Judson Ferd and Nathaniel Wright of the County of Chatham and State aforesaid with the offense of a misdemeanor: for that the said Defendants in the County of Chatham and State of Georgia aforesaid, on the 23rd day of January in the year of our Lord one thousand nine hundred and sixty-one. In that the said Defendants did assemble at Daffin Park for the purpose of disturbing the public peace and refused to disburse (sic) on being commanded to do so by Sheriff, Constable, and Peace Officer, to wit: ~~W. H. Thompson and G. W. Hillis~~, contrary to the laws of said State, the good order, peace and dignity thereof.

/s/ ANDREW J. RYAN, JR., Solicitor General of the Eastern Judicial Circuit of Georgia.

[fol. 16]

No. 21,074

IN THE CITY COURT OF SAVANNAH

TERM—MAY, 1961.

VIOLATION OF GEORGIA LAWS 26-5301 CODE OF 1933
A MISDEMEANOR

STATE

VS

NATHANIEL WRIGHT
CHARLIE L. SMART
~~(Gavon M. King)~~
JAMES W. THOMAS
BENJAMIN CARTER
JUDSON FORD
ROSCOE WHITE

ACCUSATION FOUND

This 28th day of April, 1961.

Filed in office this 28th day of April, 1961.

JESSE W. MOORE
Dept. Clerk City Court of Savannah

By ANDREW J. RYAN, JR.
Solicitor General E. J. C. of Ga.

G. W. HILLIS
Prosecutor

Witnesses for the State

G. W. HILLIS
W. H. THOMPSON
C. C. DICKERSON
CARL HAGER

[fol. 17]

IN THE CITY COURT OF SAVANNAH

PLEAS OF NOT GUILTY—May 18, 1961

And now on this 18th day of May, 1961, in Open Court comes the said Nathaniel Wright, Charlie L. Smart, Roscoe White, James W. Thomas, Benjamin Carter, Judson Ford, and waives indictment or presentment by a Grand Jury, and arraignment and trial by a Petit Jury, and for plea in this their behalf says they are Not Guilty, and puts themselves upon the Court.

B. Clarence Mayfield, E. H. Gadsden, Attorneys for Defendants.

The State says he is guilty and will so prove.

Andrew J. Ryan, Jr., Solicitor General E. J. C. of Georgia.

[fol. 18]

IN THE CITY COURT OF SAVANNAH

VERDICT OF THE JURY—May 18, 1961

May 18, 1961.

We, the Jury, find the Defendants guilty.

L. L. Black, Foreman.

IN THE CITY COURT OF SAVANNAH

SENTENCE OF THE COURT AS TO CHARLIE L. SMART, ROSCOE WHITE, JAMES W. THOMAS, BENJAMIN CARTER, JUDSON FORD—May 18, 1961

I find the defendants guilty, whereupon, it is considered, ordered and adjudged that the said defendants do pay a fine of $100.00 Each, but if the said defendants fail to pay the said fine, it is ordered that in lieu thereof they serve

Five Months Each under the jurisdiction of the State Board of Corrections.

This May 18th, 1961.

/s/ COLUMBUS E. ALEXANDER, Judge, City Court of Savannah.

IN THE CITY COURT OF SAVANNAH

SENTENCE OF THE COURT AS TO NATHANIEL WRIGHT —May 18, 1961

I find the defendant Nathaniel Wright, guilty, whereupon, it is considered, ordered and adjudged that the said defendant do pay a fine of $125.00, but if the said defendant fails to pay the said fine, it is ordered that in lieu thereof he serve Six Months, under the jurisdiction of the State Board of Corrections.

This May 18th, 1961.

/s/ COLUMBUS E. ALEXANDER, Judge, City Court of Savannah.

[fol. 19]

IN THE CITY COURT OF SAVANNAH

[Title omitted]

GENERAL DEMURRERS AND ORDER OVERRULING SAME —May 18, 1961

Now Comes the Defendants in the above named and stated case and before arraignment and before pleading to the accusation therein, and demur thereto, and for grounds of demurrer, say:

1. These Defendants demur to said accusation upon the ground that the Statute upon which said accusation is based and under which Defendants, all being Negroes, were arrested and charged, to-wit: Section 26-5301 of the Code of Georgia, "ANY TWO OR MORE PERSONS WHO SHALL ASSEMBLE FOR THE PURPOSE OF

DISTURBING THE PUBLIC PEACE OR COMMITTING ANY UNLAWFUL ACT, AND SHALL NOT DISPERSE ON BEING COMMANDED TO DO SO BY A JUDGE, JUSTICE, SHERIFF, CONSTABLE, CORONER, OR OTHER PEACE OFFICERS, SHALL BE GUILTY OF A MISDEMEANOR", is so vague that Defendants are not put on notice as to what criminal act they have allegedly committed, rendering it impossible to answer the charge or make a legal defense, thus denying to Defendants due process of law secured to them by the Fourteenth Amendment to the United States Constitution.

2. These Defendants demur to said accusation upon the ground that the Statute upon which said accusation is based and under which Defendants, all being negroes, were arrested and charged, to-wit: Section 26-5301 of the Code of Georgia, as set out in "Paragraph 1" above, is unconstitutional in that said Statute is unconscionably vague in that nowhere in said Statute does there appear a definition of disturbing the public peace or committing any unlawful [fol. 20] act. The absence of definition of these terms in sufficient specificity denies due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and the Constitution of the State of Georgia.

3. These Defendants demur to said accusation upon the ground that the Statute upon which said accusation is based and under which Defendants, all being Negroes, were arrested and charged, to-wit: Section 26-5301 of the Code of Georgia, as set out in "Paragraph 1" above, is unconstitutional as applied to these Defendants to enforce racial discrimination with respect to municipally owned recreational facilities, in that any Statute so used is unconstitutional as applied, because the Fourteenth Amendment to the United States Constitution requires that no State shall make any discrimination based on race with respect to governmentally owned facilities.

4. These Defendants demur to said accusation upon the ground that the arrest of said Defendants under Section 26-5301 of the Code of Georgia, as set out in "Paragraph 1" above, was in fact pursuant to the policy, custom and usage of the State of Georgia, which compels segregation

of races in municipally owned places of public recreation contrary to the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

5. These Defendants demur to said accusation on the ground that the Statute upon which said accusation is based and under which defendants, all being Negroes, were arrested and charged, to-wit: Section 26-5301 of the Code of Georgia, as set out in "Paragraph 1" above, vests in said Judge, Justice, Sheriff, Constable, Coroner, or other peace officers, the untramelled and arbitrary authority to predetermine the commission or the intent to commit an offense under said Statute. Defendants under said Statute is not apprized of what acts or act they are forbidden to commit, said determination being left solely to the discretion of the said peace officers. Said Statute is therefore so vague, capricious, arbitrary and unreasonable as to violate the due process clause of the Fourteenth Amend-
[fol. 21] ment to the United States Constitution.

These Defendants pray that each and all of the foregoing grounds of demurrer be examined into by the Court and that said accusation be quashed upon each and all of said grounds.

....., Attorney for Defendants.

General Demurrer filed in Clerk's Office this May 18, 1961.

Jeff F. Dickey, Clerk, City Court of Savannah.

ORDER OVERRULING DEMURRERS

May 18, 1961.

The within demurrer is overruled on each and every ground.

/s/ Columbus E. Alexander, Judge, City Court of Savannah.

[fol. 22]

IN THE CITY COURT OF SAVANNAH

RULINGS OF THE COURT

See Brief of Evidence, Page 6—beginning of cross examination of Mr. Hager by Mr. Mayfield.

Mr. Garfunkel: I object to that, Your Honor, there has been no evidence that there was a request for an arrest. There was a report made that there were negroes playing there, but nobody requested the police to make an arrest, the police just went down there and made an arrest afterwards.

Judge: I think that is the case.

Mr. Mayfield: I would like to show to the Court and Jury that the policy, pursuant to Mr. Hager's examination here, was that they would have been permitted to remain there had the police officers not arrested them.

Judge: Ask questions following the evidence in the case.

IN THE CITY COURT OF SAVANNAH

MOTION FOR ACQUITTAL AND DENIAL THEREOF

Mr. Gadsden: I would like to make a Motion for acquittal, Your Honor, based on this Georgia Statute Section 26-5301; a Statute which prohibits "Unlawful Assembly" for the purpose of disturbing the public peace. The State has not established the fact that they assembled there for the purpose of disturbing the public peace or for committing any unlawful act; the only evidence in this case is that they were there for the purpose of playing basketball, the State's own witnesses show that, and it is not within the p. . .ew (sic) of this Statute to have a conviction when it doesn't meet all of the terms and elements of the law. There is no evidence here before this Court and Jury that the defendants went there for the purpose of disturbing the public peace other than circumstantial evidence, and our position is that when circumstantial evidence is relied upon to convict a person it must have no other reasonable explanation than the one upon which the State is relying. Now if the State is basing its case upon the

fact that these defendants went there for the purpose of disturbing the public peace the only evidence it had to sustain that is the fact that they had on ordinary clothes, and the State's own witnesses have testified to the fact that they know that people play basketball in their ordinary [fol. 23] clothing, and as far as I can determine from the evidence here today that is all they have to show an attempt to disturb the public peace, and there is no other offense involved whatsoever. The only evidence before this Court today is that these defendants went there to play basketball and that they played basketball until stopped by the police officers, and that is the reason why we are asking this Court to direct a verdict for acquittal in this case; the State has failed to carry the burden in that respect.

It is a question of 'intent' and, certainly, there is no evidence as to their intent. All of the evidence they have is circumstantial and I think that the law is settled on the fact that where there is circumstantial evidence, and when there are two different conclusions, this, certainly, cannot be used to sustain a conviction and, therefore, we respectfully ask this Court to direct a verdict of acquittal in this case.

Mr. Garfunkel: Your Honor, Mr. Hager gave a very good outline of way the playgrounds are being operated in Savannah, and he stated that in general the playgrounds were for those up to 16 years in age, however, that they had no objection to those over 16 years in age playing when the others are not scheduled to play on the playgrounds, he said that was because they didn't want to mix them and he explained why he didn't want to mix them, or why they didn't want to mix them.

He further explained, Your Honor, that at that particular time of day is when the schools do use the playgrounds, and particularly this playground, with which he happens to be very familiar because it is only a block away from his office, in fact, part of it surrounds his office—that there are two parochial schools within walking distance of this playground, and that further away is another school, which sends buses all during the day to bring students to play on this playground, and that they don't allow grown people

on the playgrounds during those periods—grown people, regardless of their color, they don't want on the playgrounds during that time. Of course, at this particular [fol. 24] moment the children were not there, but momentarily the children would come, they were going to come definitely, and a lot of them come after school, but all during school hours. Mr. Hager said that the children come all during school hours and are supervised by the teachers from the school.

Now, Your Honor, these defendants were there at a place and at the time where and when grownups should not have been on the playground. They are adopting the viewpoint that they went there solely for the purpose of playing basketball. The reason they went out there was to create a disturbance, and they say that 'the reason you are arresting us is not because of this, but because we are colored'.

They went out there not dressed to play basketball, they didn't know the rules of the playground, and that is the reason why we introduced that evidence, we introduced that evidence to show 'intent' to create a disturbance of the peace. The police certainly shouldn't have to wait until a disturbance is actually created and gets beyond control before they tell them that they will have to leave, and, certainly, to nip it in the bud before any difficulty or real trouble starts, that was the purpose of the Statute.

It is not the fact that they went out there and disturbed the peace by going out there, but it is the fact that they went out there for the sole purpose of disturbing the peace, and I think that all of the evidence shows that that is what this purpose was. That the police stepped in and told them to leave, but they continued to stay there after they told them to leave and continued to play, they continued to remain on the playground the police promptly arrested them.

Judge: Motion for directed verdict overruled.

[fol. 26]

IN THE CITY COURT OF SAVANNAH

STATE OF GEORGIA

vs.

NATHANIEL WRIGHT

MOTION FOR NEW TRIAL, ORDER TO SHOW CAUSE AND DENIAL OF MOTION

Verdict and judgment for the State at May term, 1961 of City Court on 18th day of May 1961.

The defendant being dissatisfied with the verdict and judgment in said case, comes during said term of Court, before the adjournment thereof, and within 10 days from said trial, and moves the court for a new trial upon the following grounds to wit:

1. Because the verdict is contrary to evidence and without evidence to support it.

2. Because the verdict is decidedly and strongly against the weight of evidence.

3. Because the verdict is contrary to law and the principles of justice and equity.

4. Because the Statute upon which said verdict is based is so vague that the defendants were not put on notice as to what criminal act they had allegedly committed, thus denying to defendants due process of law secured to them by the First and Fourteenth Amendments to the United States Constitution.

5. Because the Statute upon which said verdict is based is unconstitutional in that said Statute is unconscionably vague in that nowhere in said Statute does there appear a definition of disturbing the public peace or committing any unlawful act. The absence of definition of these terms in sufficient specificity denies due process of law guaranteed

by the Fourteenth Amendment to the United States Constitution and the Constitution of the State of Georgia.

6. Because the Statute upon which verdict is based vest said Judge, Justice, Sheriff, Constable, Coroner or other peace officers the untramelled and arbitrary authority to predetermine the commission of the intent to commit an offense under said Statute. Defendants under said Statute is not apprized of what act or acts they are forbidden to commit, said determination being left solely to the discre- [fol. 27] tion of the said Peace Officer. Said Statute is therefore so vague, capricious, arbitrary and unreasonable as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Whereupon he prays that these, his grounds for a new trial, be inquired of by the court, and that a new trial be granted him.

B. Clarence Mayfield, E. H. Gadsden, Atty's for Movant.

Read and consider. It is ordered that the State of Georgia show cause before me, at 3:00 o'clock on the 23rd day of June, 1961, why the foregoing motion should not be granted.

It is further ordered that the State of Georgia be served with a copy of this motion and order; and that this order act as supersedeas until the further order of the court, and upon the defendant giving a good and sufficient bond in the amount of $80.00.

If for any reason said motion is not heard and determined at the time and place above fixed, it is ordered that the same shall be heard and determined at such time and place in vacation as counsel may agree upon and upon failure to agree, then at such time and place as the presiding judge may fix on the application of either party, of which time and place and opposite party shall have at least five days' notice.

If for any reason this motion is not heard and determined before the beginning of the next term of this court, then the same shall stand on the docket until heard and determined at said term or thereafter.

It is further ordered that movant have, until hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or vacation, and if the hearing of the motion shall be in vacation, and the brief of evidence has not been filed in the clerk's office at any time within ten days after motion is heard and determined.

[fol. 28] It appearing that it is impossible to make out and complete a brief of the testimony on said case before adjournment of court; it is ordered by the court that said motion be heard and determined in vacation and that movant may amend said motion at any time before the final hearing.

This 23rd day of May, 1961.

Columbus E. Alexander, Judge, City Court of Savannah.

Georgia)
Chatham County)

STATE OF GEORGIA

vs.

NATHANIEL WRIGHT

Due and legal service of the within and foregoing Motion for New Trial is hereby acknowledged, copy received.

This 22nd day of May, 1961.

Andrew J. Ryan, Jr., Solicitor General for the Eastern Judicial District of the State of Georgia.

Motion for New Trial, filed in office this 23rd day of May, 1961.

Jeff F. Dickey, Clerk, City Court of Savannah.

[fol. 29]

Order Continuing Hearing

The within Motion for New Trial is hereby continued to July 21st, 1961 at 3:00 P.M. All rights of movant are hereby reserved.

In Open Court, this 23rd day of June, 1961.

Columbus E. Alexander, Judge, City Court of Savannah.

Order Overruling Motion for New Trial

The within Motion for New Trial is hereby Overruled upon each and all of the grounds thereof.

In Open Court, this July 24th, 1961.

Columbus E. Alexander, Judge, City Court of Savannah.

[fol. 30]

IN THE CITY COURT OF SAVANNAH

STATE OF GEORGIA

VS.

CHARLES L. SMART

MOTION FOR NEW TRIAL, ORDER TO SHOW CAUSE AND DENIAL OF MOTION

Verdict and Judgment for the State at May Term, 1961, of City Court on 18th day of May, 1961.

The defendant being dissatisfied with the verdict and judgment in said case, comes during said term of Court, before the adjournment thereof, and within 10 days from said trial, and moves the court for a new trial upon the following grounds to wit:

1st. Because the verdict is contrary to evidence and without evidence to support it.

2nd. Because the verdict is decidedly and strongly against the weight of evidence.

3rd. Because the verdict is contrary to law and the principles of justice and equity.

4th. Because the Statute upon which said verdict is based is so vague that the defendants were not put on notice as to what criminal act they had allegedly committed, thus denying to defendants due process of law secured to them by the First and Fourteenth Amendments to the United States Constitution.

5th. Because the Statute upon which said verdict is based is unconstitutional in that said Statute is unconscionably vague in that nowhere in said Statute does there appear a definition of disturbing the public peace or committing any unlawful act. The absence of definition of these terms in sufficient specificity denies the process of law guaranteed by the Fourteenth Amendment to the United States Constitution and the Constitution of the State of Georgia.

6th. Because the Statute upon which verdict is based vest said Judge, Justice, Sheriff, Constable, Coroner or other peace officers the untrammeled and arbitrary authority to predetermine the commission of the intent to commit an offense under said Statute. Defendants under said Statute is not apprized of what act or acts they are forbidden to commit, said termination being left solely to the dis-[fol. 31] cretion of the said Peace Officer. Said Statute is therefore so vague, capricious, arbitrary and unreasonable as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Whereupon, he prays that these, his grounds for a new trial, be inquired of by the court, and that a new trial be granted him.

B. Clarence Mayfield, E. H. Gadsden, Attorneys for Movant.

Read and Considered. It is ordered that the State of Georgia show cause before me, at 3 o'clock on the 23rd day of June, 1961, why the foregoing motion should not be granted.

It is further ordered that the State of Georgia be served with a copy of this motion and order; and that this order act as a supersedeas until the further order of the court, and upon the defendant giving a good and sufficient bond in the amount of $80.00.

If for any reason said motion is not heard and determined at the time and place above fixed, it is ordered that the same shall be heard and determined at such time and place in vacation as counsel may agree upon, and upon a failure to agree, then at such time and place as the presiding judge may fix on the application of either party, of which time and place the opposite party shall have at least five days' notice.

If for any reason this motion is not heard and determined before the beginning of the next term of this court, then the same shall stand on the docket until heard and determined at said term or thereafter.

It is further ordered that movant have, until hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or vacation, and if the hearing on the motion shall be in vacation, and the brief of the evidence has not been filed in the clerk's office at any time within ten days after motion is heard and determined.

[fol. 32] It appearing that it is impossible to make out and complete a brief of the testimony on said case before adjournment of court; it is ordered by the court that said motion be heard and determined in vacation and that movant may amend said motion at any time before the final hearing.

This 23rd day of May, 1961.

/s/ COLUMBUS E. ALEXANDER, Judge City Court of Savannah.

Acknowledgment of Service

State of Georgia)
County of Chatham)

STATE OF GEORGIA

vs.

CHARLES L. SMART

Due and Legal service of the within and foregoing Motion for New Trial is hereby acknowledged, copy received. This 22nd day of May, 1961.

/s/ Andrew J. Ryan, Jr., Solicitor General for the Eastern Judicial District of the State of Georgia.

Motion for New Trial as to Charles L. Smart filed in Clerk's Office this May 23, 1961.

Jeff F. Dickey, Clerk City Court of Savannah.

[fol. 33]

Order Continuing Hearing on Motion for New Trial

The within Motion for New Trial is hereby continued to July 21, 1961, at 3:00 P.M. All rights of movant are hereby reserved.

In Open Court this June 23, 1961.

Columbus E. Alexander, Judge, City Court of Savannah.

Order of Court Overruling Motion for New Trial

The within Motion for New Trial is hereby overruled upon each and all of the grounds thereof.

In Open Court this July 24, 1961.

Columbus E. Alexander, Judge, City Court of Savannah.

[fol. 34]

IN THE CITY COURT OF SAVANNAH

STATE OF GEORGIA

vs.

ROSCOE WHITE

MOTION FOR NEW TRIAL, ORDER TO SHOW CAUSE AND DENIAL OF MOTION

Verdict and Judgment for the State at May Term, 1961, of City Court on 18th day of May, 1961.

The defendant being dissatisfied with the verdict and judgment in said case, comes during said term of Court, before the adjournment thereof, and within 10 days from said trial, and moves the court for a new trial upon the following grounds, towit:

1. Because the verdict is contrary to evidence and without evidence to support it.

2. Because the verdict is decidedly and strongly against the weight of evidence.

3. Because the verdict is contrary to law and the principles of justice and equity.

4. Because the Statute upon which said verdict is based is so vague that the defendants were not put on notice as to what criminal act they had allegedly committed, thus denying to defendants due process of law secured to them by the First and Fourteenth Amendments to the United States Constitution.

5. Because the Statute upon which said verdict is based is unconstitutional in that said Statute is unconscionably vague in that nowhere in said Statute does there appear a definition of disturbing the public peace or committing any unlawful act. The absence of definition of these terms in sufficient specificity denies due process of law guaran-

teed by the Fourteenth Amendment to the United States Constitution and the Constitution of the State of Georgia.

6. Because the Statute upon which verdict is based vest said Judge, Justice, Sheriff, Constable, Coroner or other peace officers and untrammeled and arbitrary authority to predetermine the commission of the intent to commit an offense under said Statute. Defendants under said Statute is not apprized of what acts or act they are forbidden to commit, said determination being left solely to the discretion of the said Peace Officer. Said Statute is therefore [fol. 35] so vague, capricious, arbitrary and unreasonable as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Whereupon, he prays that these, his grounds for a new trial, be inquired of by the court, and that a new trial be granted him.

B. Clarence Mayfield, E. H. Gadsen, Attorneys for Movant.

Read and Considered. It is ordered that the State of Georgia show cause before me, at 3 o'clock on the 23rd day of June, 1961, why the foregoing motion should not be granted.

It is further ordered that the State of Georgia be served with a copy of this motion and order; and that this order act as a supersedeas until the further order of the court, and upon the defendant giving a good and sufficient bond in the amount of $80.00.

If for any reason said motion is not heard and determined at the time and place above fixed, it is ordered that the same shall be heard and determined at such time and place in vacation as counsel may agree upon, and upon failure to agree, then at such time and place as the presiding judge may fix on the application of either party, of which time and place the opposite party shall have at least five days' notice.

If for any reason this motion is not heard and determined before the beginning of the next term of this court, then

the same shall stand on the docket until heard and determined at said term or thereafter.

It is further ordered that movant have, until hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or vacation, and if the hearing of the motion shall be in vacation, and the brief of evidence has not been filed in the clerk's office at any time within ten days after motion is heard and determined.

It appearing that it is impossible to make out and complete a brief of the testimony on said case before adjournment of court; it is ordered by the court that said motion be heard and determined in vacation and that movant may amend said motion at any time before the final hearing.

[fol. 36] This 23rd day of May, 1961.

/s/ Columbus E. Alexander, Judge City Court of Savannah.

Acknowledgment of Service

State of Georgia)
County of Chatham)

STATE OF GEORGIA

vs.

ROSCOE WHITE

Due and legal service of the within and foregoing motion for new trial is hereby acknowledged, copy received. This 22 day of May, 1961.

/s/ ANDREW J. RYAN, JR., Solicitor General for the Eastern Judicial District of the State of Georgia.

Motion for new trial as to Roscoe White filed in Clerk's Office this 23rd day of May, 1961.

Jeff F. Dickey, Clerk, City Court of Savannah

[fol. 37]

Order Continuing Hearing

The within Motion for New Trial is hereby continued to July 21, 1961, at 3:00 P.M. All rights of movant are hereby reserved.

In Open Court, this 23rd day of June, 1961.

Columbus E. Alexander, Judge, City Court of Savannah.

Order Overruling Motion for New Trial

The within Motion for New Trial is hereby Overruled upon each and all of the grounds thereof.

In Open Court, this 24th day of July, 1961.

Columbus E. Alexander, Judge, City Court of Savannah.

[fol. 38]

In the City Court of Savannah

State of Georgia

vs.

James W. Thomas

Motion for New Trial, Order to Show Cause and Denial of Motion

Verdict and Judgment for the State at May Term, 1961, of City Court on 18th day of May, 1961.

The defendant being dissatisfied with the verdict and judgment in said case, comes during said term of Court, before the adjournment thereof, and within 10 days from said trial, and moves the court for a new trial upon the following grounds, towit:

1st. Because the verdict is contrary to evidence and without evidence to support it.

2nd. Because the verdict is decidedly and strongly against the weight of evidence.

3rd. Because the verdict is contrary to law and the principles of justice and equity.

4th. Because the Statute upon which said verdict is based is so vague that the defendants were not put on notice as to what criminal act they had allegedly committed, thus denying to defendants due process of law secured to them by the First and Fourteenth Amendments to the United States Constitution.

5th. Because the Statute upon which said verdict is based is unconstitutional in that said Statute is unconscionably vague in that nowhere in said Statute does there appear a definition of disturbing the public peace or committing any unlawful act. The absence of definition of these terms in sufficient specificity denies due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and the Constitution of the State of Georgia.

6th. Because the Statute upon which verdict is based vest said Judge, Justice, Sheriff, Constable, Coroner or other peace officers the untrammeled and arbitrary authority to predetermine the commission of the intent to commit an offense under said Statute. Defendants under said Statute is not apprized of what act or acts they are forbidden to commit, said determination being left solely to the discretion of the said Peace Officer. Said Statute is [fol. 39] therefore so vague, capricious, arbitrary and unreasonable as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Whereupon, he prays that these, his grounds for a new trial, be inquired of by the Court, and that a new trial be granted him.

/s/ B. Clarence Mayfield, E. H. Gadsden, Attorneys for Movant.

Read and Considered. It is ordered that the State of Georgia show cause before me, at 3 o'clock on the 23rd day of June, 1961, why the foregoing motion should not be granted.

It is further ordered that the State of Georgia be served with a copy of this motion and order; and that this order act as a supersedeas until the further order of the court, and upon the defendant giving a good and sufficient bond in the amount of $80.00.

If for any reason said motion is not heard and determined at the time and place above fixed, it is ordered that the same shall be heard and determined at such time and place in vacation as counsel may agree upon, and upon failure to agree, then at such time and place as the presiding judge may fix on the application of either party, of which time and place the opposite party shall have at least five days' notice.

If for any reason this motion is not heard and determined before the beginning of the next term of this court, then the same shall stand on the docket until heard and determined at said term or thereafter.

It is further ordered that movant have, until hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or vacation, and if the hearing of the motion shall be in vacation, and the brief of evidence has not been filed in the Clerk's office at any time within ten days after motion is heard and determined.

[fol. 40] It appearing that it is impossible to make out and complete a brief of the testimony on said case before adjournment of court; it is ordered by the court that said motion be heard and determined in vacation and that movant may amend said motion at any time before the final hearing.

This 23rd day of May, 1961.

/s/ Columbus E. Alexander, Judge, C.C.S.

State of Georgia)
County of Chatham)

STATE OF GEORGIA

vs.

JAMES W. THOMAS

Due and legal service of the within and foregoing motion for New Trial is hereby acknowledged, copy received.

This 22nd day of May, 1961.

/s/ Andrew J. Ryan, Jr., Solicitor General for the Eastern Judicial District of the State of Georgia.

Chatham County Courthouse
Room 310
Savannah, Georgia

Motion for a New Trial as to James W. Thomas, filed in Clerk's office this 23rd day of May, 1961.

Jeff F. Dickey, Clerk, City Court of Savannah.

[fol. 41]

Order Continuing Hearings

The within Motion for New Trial is hereby continued to July 21, 1961, at 3:00 P.M. All rights of movant are hereby reserved.

In Open Court, this 23rd day of June, 1961.

Columbus E. Alexander, Judge, C.C.S.

Order Overruling Motion for New Trial

The within Motion for New Trial is hereby Overruled upon each and all of the grounds thereof.

In Open Court, this 24th day of July, 1961.

Columbus E. Alexander, Judge, City Court Savannah.

[fol. 42]

IN THE CITY COURT OF SAVANNAH

STATE OF GEORGIA

VS.

BENJAMIN CARTER

MOTION FOR NEW TRIAL, ORDER TO SHOW CAUSE AND DENIAL OF MOTION

Verdict and judgment for the State at May term, 1961 of City Court on 18th day of May, 1961.

The Defendant being dissatisfied with the verdict and judgment in said case, comes during said term of Court, before the adjournment thereof, and within 10 days from said trial, and moves the court for a new trial upon the following grounds to wit:

1. Because the verdict is contrary to evidence and without evidence to support it.

2. Because the verdict is decidedly and strongly against the weight of evidence.

3. Because the verdict is contrary to law and the principles of justice and equity.

4. Because the Statute upon which said verdict is based is so vague that the defendants were not put on notice as to what criminal act they had allegedly committed, thus denying to defendants due process of law secured to them by the First and Fourteenth Amendments to the United States Constitution.

5. Because the Statute upon which said verdict is based is unconstitutional in that said Statute is unconscionably vague in that nowhere in said statute does there appear a definition of disturbing the public peace or committing any unlawful act. The absence of definition of these terms in sufficient specificity denies due process of law guaranteed

by the Fourteenth Amendment to the United States Constitution and the Constitution of the State of Georgia.

6. Because the Statute upon which verdict is based vest said Judge, Justice, Sheriff, Constable, Coroner or other peace officers the untrammeled and arbitrary authority to predetermine the commission of the intent to commit an offense under said Statute. Defendants under said Statute is not apprized of what act or acts they are forbidden to commit, said determination being left solely to the discretion of the said Peace Officer. Said Statute is therefore so vague, capricious, arbitrary and unreasonable as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

[fol. 43] Whereupon he prays that these, his grounds for a new trial, be inquired of by the court, and that a new trial be granted him.

B. Clarence Mayfield, E. H. Gadsden, Atty's for Movant.

Read and consider. It is ordered that the State of Georgia show cause before me, at 3:00 o'clock on the 23rd day of June, 1961, why the foregoing motion should not be granted.

It is further ordered that the State of Georgia be served with a copy of this motion and order; and that this order act as supersedeas until the further order of the court, and upon the defendant giving a good and sufficient bond in the amount of $80.00.

If for any reason said motion is not heard and determined at the time and place above fixed, it is ordered that the same shall be heard and determined at such time and place in vacation as counsel may agree upon, and upon failure to agree, then at such time and place as the presiding judge may fix on the application of either party, of which time and place the opposite party shall have at least five days notice.

If for any reason this motion is not heard and determined before the beginning of the next term of this court, then

the same shall stand on the docket until heard and determined at said term or thereafter.

It is further ordered that movant have, until hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or vacation, and if the hearing of the motion shall be in vacation, and the brief of evidence has not been filed in the clerk's office at any time within ten days after motion is heard and determined.

[fol. 44] It appearing that it is impossible to make out and complete a brief of the testimony on said case before adjournment of court; it is ordered by the court that said motion be heard and determined in vacation and that movant may amend said motion at any time before the final hearing.

This 23rd day of May, 1961.

Columbus E. Alexander, Judge, City Court of Savannah.

State of Georgia)
County of Chatham)

STATE OF GEORGIA

VS.

BENJAMIN CARTER

Due and legal service of the within and foregoing Motion for New Trial is hereby acknowledged, copy received.

This 22nd day of May, 1961.

Andrew J. Ryan, Jr., Solicitor General for the Eastern Judicial District of the State of Georgia.

Chatham County Courthouse
Room 301
Savannah, Georgia

Motion for New Trial, filed in Office this 23rd day of May, 1961.

Jeff F. Dickey, Clerk, City Court of Savannah.

[fol. 45]

Order Continuing Hearing

The within Motion for New Trial is hereby continued to July 21, 1961 at 3:00 P.M. All rights of movant are hereby reserved.

In Open Court, this 23rd day of June, 1961.

Columbus E. Alexander, Judge, City Court of Savannah.

Order Overruling Motion for New Trial

The within Motion for New Trial is hereby Overruled upon each and all of the grounds thereof.

In Open Court, this 24th day of July, 1961.

Columbus E. Alexander, Judge, City Court of Savannah.

[fol. 46]

IN THE CITY COURT OF SAVANNAH

STATE OF GEORGIA

VS.

JUDSON FORD

MOTION FOR NEW TRIAL, ORDER TO SHOW CAUSE AND DENIAL OF MOTION

Verdict and judgment for the State at May term, 1961 of City Court on 18th day of May, 1961.

The defendant being dissatisfied with the verdict and judgment in said case, comes during said term of Court, before the adjournment thereof, and within 10 days from said trial, and moves the court for a new trial upon the following grounds to wit:

1. Because the verdict is contrary to evidence and without evidence to support it.

2. Because the verdict is decidedly and strongly against the weight of evidence.

3. Because the verdict is contrary to law and the principles of justice and equity.

4. Because the Statute upon which said verdict is based is so vague that the defendants were not put on notice as to what criminal act they had allegedly committed, thus denying to defendants due process of law secured to them by the First and Fourteenth Amendments to the United States Constitution.

5. Because the Statute upon which said verdict is based is unconstitutional in that said Statute is unconscionably vague in that nowhere in said Statute does there appear a definition of disturbing the public peace or committing any unlawful act. The absence of definition of these terms in sufficient specificity denies due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and the Constitution of the State of Georgia.

6. Because the Statute upon which verdict is based vest said Judge, Justice, Sheriff, Constable, Coroner or other peace officers the untrammeled and arbitrary authority to predetermine the commission of the intent to commit an offense under said Statute. Defendants under said Statute is not apprized of what act or acts they are forbidden to commit, said determination being left solely to the discretion of the said Peace Officer. Said Statute is therefore so vague, capricious, arbitrary and unreasonable as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

[fol. 47] Whereupon he prays that these, his grounds for a new trial, be inquired of by the court, and that a new trial be granted him.

B. Clarence Mayfield, E. H. Gadsden, Atty's for Movant.

Read and consider. It is ordered that the State of Georgia show cause before me, at 3:00 o'clock on the 23rd day of June, 1961, why the foregoing motion should not be granted.

It is further ordered that the State of Georgia be served with a copy of this motion and order; and that this order act as supersedeas until the further order of the court, and upon the defendant giving a good and sufficient bond in the amount of $80.00.

If for any reason said motion is not heard and determined at the time and place above fixed, it is ordered that the same shall be heard and determined at such time and place in vacation as counsel may agree upon, and upon failure to agree, then at such time and place as the presiding judge may fix on the application of either party, of which time and place the opposite party shall have at least five days notice.

If for any reason this motion is not heard and determined before the beginning of the next term of this court, then the same shall stand on the docket until heard and determined at said term or thereafter.

It is further ordered that movant have, until hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or vacation, and if the hearing of the motion shall be in vacation, and the brief of evidence has not been filed in the clerk's office at any time within ten days after motion is heard and determined.

It appearing that it is impossible to make out and complete a brief of the testimony on said case before adjourn-

ment of court; it is ordered by the court that said motion be heard and determined in vacation and that movant may amend said motion at any time before the final hearing.

[fol. 48] This 23rd day of May, 1961.

Columbus E. Alexander, Judge, City Court of Savannah.

Chatham County)
Georgia)

STATE OF GEORGIA

vs.

JUDSON FORD

Due and legal service of the within and foregoing Motion for New Trial is hereby acknowledged, copy received.

This 12th day of May, 1961.

Andrew Ryan, Jr., Solicitor General for the Eastern Judicial District of the State of Georgia.

Chatham County Courthouse
Room 301
Savannah, Georgia

Motion for New Trial, filed in Clerk's office this 23rd day of May, 1961.

Jeff F. Dickey, Clerk, City Court of Savannah.

[fol. 49]

Order Continuing Hearing

The within Motion for New Trial is hereby continued to July 21st, 1961 at 3:00 P.M. All rights of movant are hereby reserved.

In Open Court, this 23rd day of June, 1961.

Columbus E. Alexander, Judge, City Court of Savannah.

Order Overruling Motion for New Trial

The within Motion for New Trial is hereby Overruled upon each and all of the grounds thereof.

In Open Court, this July 24th, 1961.

Columbus E. Alexander, Judge, City Court of Savannah.

[fol. 50]

IN THE CITY COURT OF SAVANNAH

Georgia)
Chatham County)

Criminal No. 21074

STATE OF GEORGIA, Plaintiff,

vs.

NATHANIEL WRIGHT, CHARLES L. SMART, ROSCOE WHITE, JAS. W. THOMAS, BENJAMIN CARTER, JUDSON FORD, Defendants.

Violating Section 26-5301 Code of Georgia—1933

Brief of the Evidence

Tried in the City Court of Savannah, Chatham County, Georgia, on May 18th, 1961, before the Honorable Columbus E. Alexander, Judge of said Court, with a jury.

APPEARANCES:

Sylvan A. Garfunkel, Esq., Asst. Solicitor General; Court House, Savannah, Ga., for the State.

E. A. Gadsden, Esq., B. C. Mayfield, Esq., Attorneys at law, Savannah, Georgia, for the Defendants.

And Thereupon G. H. THOMPSON duly sworn, testified:

My name is G. H. Thompson. I am a member of the Savannah Police Department, and I was a member of the

Savannah Police Department on or around January 23, 1961, and I was on duty around two o'clock, here in Savannah, Chatham County, Georgia. A white lady came up and told us about certain people being in Daffin Park and asked us certain questions about them—we were, at that time, at about the eastern end of Grayson Stadium, which is situated at the end of the Daffin Park area—Daffin Park consists of an area of about 50 acres and it is a recreational park. This white lady came up and gave us certain information and asked us certain questions about it, and we made an investigation at a basket ball court, in Daffin Park, which was about 500 feet west of where we were at the time we had our conversation with this white lady—Officer [fol. 51] G. W. Hillis was with me at the time, and as a result of the conversation with this white lady we rode over to this Basket Ball Court to investigate, and when we arrived at this Basket Ball Court we found around seven colored boys playing basket ball there on the Basket Ball Court.

Q. Are they here today?

A. Yes sir.

Q. Are some of them here?

A. Yes sir.

Q. Where are they?

A. Well, this one with the red stripe tie, that's one of them, and the other, sitting beside him on the right, and the one with the light shirt. That's the only three I recognize.

Brief continues:

As to their dress, they were pretty well dressed at that time; some of them had on dress shirts, some of them had on coats—not a dress coat, but a jacket. I didn't notice what particular type shoes they had on, as far as I know they didn't have 'tennis shoes' on. I am familiar with the type of shoes that people wear when they play basket ball, they didn't have that type of shoes on as well as I remember.

I think that these defendants ranged in age from 23 to 32.

There is a school nearby this Basket Ball Court, it is located at Washington Avenue and Bee Road, I mean, at Washington Avenue and Waters. There is another school on 44th Street—there are two schools nearby; I believe that they are both 'grammar' schools. I patrol that area and the children from these schools play there, they come there everyday I believe, I believe they come there every afternoon when they get out of school, and I believe they come there during recess. The school, I believe, gets out about 2:30 in the afternoon, and this was around 2:00 o'clock.

When I came up to these defendants I asked them to leave; I spoke to all of them as a group when I drove up there, and I asked them to leave twice, but they did not leave at that time. I gave them an opportunity to leave. One of the, I don't know which one it was, came up and asked me who gave me orders to come out there and by what authority I came out there, and I told him that I didn't need any orders to come out there, I believe the one that [fol. 52] asked me that is the third one there, sitting at the table in the Court Room here, the one there with the coat on, with the red button on it. The children from the schools, would have been out there shortly after that. The purpose of asking them to leave was to keep down trouble, which looked like to me might start—there were five or six cars driving around the park at the time, white people. They left only after they were put under arrest, they were put under arrest approximately 5 to 10 minutes after I told them to leave,—Officer Hillis is the one who put them under arrest —we called the police cruiser and it came and we put them in that. It seemed like to me that they were welcoming the arrests, because all of them piled into the car, Officer Hillis's car, at the time, and he had to stop them—Officer Hillis' car did not carry any of them, the cruiser carried them in, they waited in the car until the cruiser came, all seven of them, it was seven of them. Officer Dickerson came up, he was riding as Street Sergeant at the time, and I reported to him what had happened.

Cross Examination of Officer Thompson by Mr. Gadsden:

This matter first came to my attention when this white lady had this conversation with us, the lady who told us

that colored people were playing in the Basket Ball Court down there at Daffin Park, and that is the reason I went there, because some colored people were playing in the park. I did not ask this white lady how old these people were. As soon as I found out these were colored people I immediately went there.

I have seen people play basket ball without uniforms on. I hadn't paid too much attention to basketball, so I don't know if a man 32 years old would play that game or not, but it is possible that a person who is 32 could be playing basket ball, and it is possible for a person of twenty-three to be playing basketball too. Under ordinary circumstances I would not arrest boys for playing basketball in a public park. I have never made previous arrests in Daffin Park because people played basketball there, I don't have any knowledge myself if any certain age group is limited to any particular basketball Court, I don't know the rules of the City Recreational Department.

[fol. 53] I arrested these people for playing basket ball in Daffin Park. One reason was because they were negroes. I observed the conduct of these people, when they were on the basketball Court and they were doing nothing besides playing basket ball, they were just normally playing basket ball, and none of the children from the schools were there at that particular time.

I made these arrests around 2:00 o'clock, and the schools let out around 2:30 o'clock, and it would have been at least 30 minutes before any children would have been in this particular area.

This basketball Court is approximately 100 yards from Waters Avenue, and there is a north-south driveway, which goes right by the court, it circles the park—the driveway is about 15 yards out from the basket ball court, it runs on each side of it, I believe that it is Waring Drive that runs in from Waters Avenue and these driveways runs from Waring Drive. There were cars riding around on these driveways, at least five or six cars, I wouldn't say that that was unusual traffic for that time of day.

When I asked them to leave is when that party asked me as to what authority I was asking them to leave. I believe

that they asked Officer Hillis for his badge number. I don't think that it is unusual for one to inquire 'why' they are being arrested.

Redirect Examination by Mr. Garfunkel:

I believe that most of them had on dress pants, as far as I can remember. I have seen people playing basket ball, but I have never seen them come out dressed like that to play basketball. There have been colored children in Daffin Park, but I did not arrest those children, but I arrested these people because we were afraid of what was going to happen. Colored children have played in Daffin Park, and they have fished there.

Recross Examination by Mr. Gadsden:

I have observed colored children playing in Daffin Park, but not playing basketball, but I have observed them playing and fishing, we had gotten previous calls that they were fishing in there and such, but not playing basketball. I have never made an arrest in Daffin Park.
[fol. 54] sometimes they do and sometimes they don't. It is possible to play basketball in street clothes.

Redirect Examination by Mr. Garfunkel:

If I wanted to play basketball I would not go out there dressed up, not the way they were dressed.

Carl Hager duly sworn, testified:

Direct Examination by Mr. Garfunkel:

My name is Carl Hager, I am Superintendent of the Recreational Department of the City of Savannah. As superintendent I am over all of the playgrounds in the City of Savannah, Chatham County, Georgia; that includes Daffin Park and all the other parks that have playgrounds. These playgrounds are mostly in neighborhood areas. There are neighborhood areas where colored families live, and neighborhood areas where white people live, we try to

establish them in that manner, and, then, there are certain areas where they are mixed to a certain extent. We have a playground in the Park Extension, and that is a mixed areas for white and colored—a white section and a colored section—it is mostly white, but there are several colored sections within several blocks, and they are much closer now than they use to be. Wells Park is what we call a border-area and that is a mixed area—one side is colored and one side is white. The Daffin Park area, mostly around that area is mostly white. It has occurred, from time to time, that colored children would play in the Daffin Park area and in the Park Extension area, but no action had been taken, because it is legal, it is allowed, and nobody has said anything about it. I am familiar with the Daffin Park playground area, in fact, the office of the Recreational Department is in Daffin Park. That basket ball court is about a block from the office. I was advised that an arrest had been made, but they had all gone when I was told about it and I did know why the arrests had been made. The playground areas are basically for young children, say 15 to 16 and under, along that age group, we give priority to the playground to the younger children over the grown-ups, it made no difference as to whether they were white or colored. Anytime that we requested anyone to do something [fol. 55] and they refused we would ask the police to step in, if we would ask them to leave and they did not we would ask the police to step in. We have had reports that colored children have played in the Park Extension, but they were never arrested or told to leave.

We have had grown people to come out to Daffin Park and play soft-ball; we have soft-ball diamonds and also younger people play on them, but we try to regulate the times for playing on the diamonds so that there will not be a conflict between the older people and the younger ones, and we issue permits in all cases where we think there will be conflict, we try to regulate them. We do not have the Tennis Courts regulated at the present time, they are now on first come first serve basis, but we plan to regulate these.

Cross Examination by Mr. Mayfield:

Q. Mr. Hager, I would like to ask you if your office made the request for the arrest on February 21st?

Objection to above by Mr. Garfunkel—see rulings of the Court, page 1, top of page.

Brief continues:

There are no signs posted in conspicuous places around the park defining what hours certain age groups were to use particular areas of the park, but we do have signs saying that you do have to request permits from the office before using certain facilities, in other words, we designate the time ourselves as to what is to be carried out in those areas. I testified that if there was a conflict between the younger people and the older people using the park facilities the preference would be for the younger people to use *them*, but we have no objections to older people using the facilities if there are no younger people present or if they are not scheduled to be used by the younger people.

There are about 7 parks in the City in negro areas and about 14 in white areas, and that changes during the season of a year according to the leadership, and I might explain that we could set apart the one that is under leadership; we have areas that have equipment, but do not have leaders and we do not consider those play grounds, it is only those where we have paid leadership, like tennis courts, and at Daffin Park and at Cann Park, where we pay an individual [fol. 56] to open and close the playgrounds and regulate the use of them.

The parks in white areas are located as follows:

'Savannah Gardens'—Pensylvania near Jones; 'Avondale'—Texas Avenue and 'Victory Heights'—east 42nd Street, on the other side of Skidaway; 'Forrest Hills'—near DeRenne Ave. and Skidaway Road; 'Hull': 54th and Atlantic Avenue; 'Daffin Park'—Waters and Victory Drive; 'Garden Homes'—near Park Avenue and Cedar; 'Live Oak'—Park Avenue and Live Oak; 'Davant'—Perry and Lincoln; 'Wells'—38th and Montgomery; 'Forsyth'—Gaston and Bull; 'Fred Wessels'—Fred Wessels Housing Units.

The parks in negro areas are located as follows:

'Yamacraw Village'; 'Carver Village area'—West Gwinnett Street; 'Pearl Smith School', which is also out in that area; 'Cann'—Burroughs and W. 45th Street; 'Soldiers Field Area—Paulsen and Joe; 'Robert Hitch Housing Area. Now that is six of them, I can't think of the seventh at present.

It has been the custom to use the parks separately for the different races. I couldn't say whether or not a permit would or would not be issued to a person of color if that person came to the office the Recreational Department and requested a permit to play on the courts, but I am of the opinion that it would have been, we have never refused one, the request never has been made.

Grownups use Daffin Park at certain times and under certain conditions, but to be frank with you I have never seen any using the basketball courts, however grownups could use them if there was no other need for them. To some extent particular attire is required for use on the basketball court, because we feel some responsibility to the people, in reference to the proper attire worn—we don't want them playing on there with baseball spikes on their shoes, or track shoes, or, in some cases, certain types of other shoes like shoes worn on a tennis court. We would expect them to wear the usual basketball attire—short trunks and what have you, if they were playing in one of our supervised regulated programs, but we would probably not expect it if they were playing in an unregulated and unsupervised program, and it would be consistent with our program to allow persons to wear ordinary clothing on the courts if [fol. 57] they so chose to do so, I don't think that we would object to that. There is no minimum or maximum age limit for the use of basket ball courts, however, at the present time we have established a minimum—a maximum age limit of 16 years for any playground area. Programming is not so readily understood by lay people, by age grouping is taken into consideration in programming because we don't want the older people competing with the younger people, and we don't like to have them associating because we don't think that a younger person should learn too much from the

older person or vice versa, we don't think it conducive to good community relations, the building of character and the proper traits for younger people, and I think the school systems have followed somewhat the same procedure in segregating them in age groups, such as the younger school groups, the junior highs, and the high schools, and it is for the same purpose that we regulate our programs according to age groups and, sometimes, sexes also, and all of this is in accordance with, basically, a planned program. I could not answer the question as to whether everyone using the basketball courts come under the planned program, but at times they do use it when we are not putting a plan into action and when not using it, but I couldn't say when or where, because we are not there and we don't know. There is no regulation for playing on a Court when it is not in use and there is no one around.

Redirect Examination by Mr. Garfunkel:

On school days these courts and the playground area at Daffin Park are available for only certain age groups and they are only used at that time of day by the schools in that vicinity, it is, more or less, left available for them, that is the way we have our recreation setup.

Most of our playground areas are arranged according to the families living in that particular area, playgrounds where there are white families and playgrounds where there are colored families—most of them are arranged in that manner according to the areas. We do feel this, that playgrounds are established within a distance of one mile of the people who are expected to use them, and normally when we find that when a playground is established with that in mind that people who live within one mile of it will use it, so if we put one in a predominantly negro neighborhood, then, predominantly negroes would use it. [fol. 58] and the same would be true for the whites, but, of course, we can't always control that because we do not have the choice of locations where we would like to have them, and that is the reason why some could very easily become mixed areas, such as Park Extension, because that is within a mile of both white and colored, and that is the reason why both play in that area.

Recross Examination by Mr. Mayfield:

I don't know whether or not we had a planned program arranged for the day that these arrests were made, I would have to check my records. We do not have parks in colored areas that are comparable in size or comparable in facilities to Daffin Park, but colored boys do fish in the pond at Daffin Park. The size of the facilities would be determined by the area. Cann Park is probably our most complete area that is in a colored neighborhood, and on that we have a tennis court—and we use that court for basketball, we have swings, slides, soft ball field, a small practice field, which is also used for football, and it also has a concrete spray pool, picnic table, and a few other odds and ends of equipment, and it has a drinking fountain, and things of that nature, which would make it about as well equipped as any playground we have except for size.

I believe that the Cann Park basket ball court was completed on January 23, 1961.

Q. If your planned program did not have the 23rd of January, 1961, set aside for any particular activity would it have been permissible to use this basket ball court in Daffin Park in the absence of children.

A. I can't very well answer that question because you have several questions in one. First, I would like to say that normally we would not schedule anything for that time of the day because of the schools using the totals area there and, second, I would not know whether we had something scheduled without referring to my records. Now if the schools were not there and were not using it and we had no program planned we certainly would not have been concerned about other people using it. The schools use the area during school hours. The Parochial School uses it during recess and lunch periods and also for sport, as also the Lutheran School, and the public schools bring their students out there by bus and at various times during school [fol. 59] hours all day long, we never know when they are coming, and they use Cann Park the same way, I might add.

If it was compatible to our program we would grant a permit for the use of the basket ball court in Daffin Park to anyone regardless of race, creed or color, however, at that

time of day it would not be compatible to our program. If that basket ball court was not schedule] it would be compatible with our program for them to use it, and we would not mind them using it. If there was a permit issued there would be no objections as to race, creed or color.

C. C. DICKERSON duly sworn, testified:

Direct Examination by Mr. Garfunkel:

On January 23rd of this year I was a Street Sergeant with the Savannah Police Department. I was a Street Sergeant around two o'clock in the afternoon of that date when I received a call to go to the vicinity of Daffin Park. That was on a school day and school was in session on that day.

When I arrived there I found certain men in the custody of Officers Hillis and Thompson, these men are here today, they are all sitting at the table there with their two attorneys—there were seven originally, but there are only six of the defendants sitting at the table—Garvin King, age 19, hasn't shown up today.

These defendants were under arrest when I arrived. They called for the Street Sergeant, but before I got there I heard them call for the wagon also. When I arrived I found these defendants dressed up nicely, I don't think that all of them had suits on, but they had on nice pants and shoes—they were all dressed nice. I would say that they wasn't dressed for playing basketball, if I were playing basketball I would have on something more comfortable other than what they had on, all of the people were dressed nice though

Cross Examination of Mr. Dickerson by Mr. Gadsden:

All of the activities were over when I arrived there.
[fol. 60] I have played basketball, but along about the time I played basketball out in the country I didn't have on shoes, I was dressed in the custom and style of that time.

I have been a policeman for quite sometime. I have seen people playing on basketball courts in casual attire, but

I wouldn't say that I have seen them playing basketball while being dressed as nicely as these people were on this particular day, but I'd say that they sometimes play in their ordinary clothes, but I'd say also that they usually play in dungarees and khaki and slacks, but these people were dressed a little better than that.

I knew a basketball coach, who was thirty. Professional players get on up above thirty years in age sometimes, and I guess there are some people above thirty who play basketball.

G. W. Hillis duly sworn, testified:

Direct Examination by Mr. Garfunkel:

My name is G. W. Hillis, I am a police officer of the Savannah Police Department, and I was a member of and on duty with the Savannah Police Department on or about the 23rd day of January of this year; I was on duty then and I had on my police uniform. I was on duty with Officer Thompson, he also had on his police uniform, I was on duty around two o'clock on the afternoon of the date in the vicinity of Daffin Park, here in Savannah, Chatham County, Georgia, at around that time I received some information from a white lady as a result of that information I went with Officer Thompson, in a police automobile, to the basketball court in Daffin Park, here in Savannah, Chatham County, Georgia. When I arrived there I saw the defendants, they were playing basketball. Officer Thompson talked to them first, and then I talked to them. I asked them to leave, Officer Thompson had already asked them, I heard him ask them. They did not leave, and they did not stop playing until I told them they were under arrest. We called the wagon (cruiser). Officer Thompson told them that they would have to leave, he told them that at first, and they did have an opportunity to leave after he told them that. He asked them to leave, and then I asked them to leave after I saw they wasn't going to stop playing, and [fol. 61] when I asked them to leave one of them made a sarcastic remark, saying: "What did he say, I didn't hear him", he was trying to be sarcastic. When I told them to

leave there was one of them who was writing with a pencil and looking at our badge numbers. They all had an opportunity to leave before I arrested them, plenty of time to have left, but I told them to leave, they wouldn't leave and I put them under arrest.

Cross Examination by Mr. Mayfield:

When I arrived the defendants were playing basketball. They were not necessarily creating any disorder, they were just 'shooting at the goal', that's all they were doing, they wasn't disturbing anything.

Redirect Examination by Mr. Garfunkel:

I am familiar with the fact that there are schools in that area, and that children would be out there in about 15 minutes to play in that area.

Recross Examination by Mr. Mayfield:

The arrests were around two o'clock. The schools discharge their students around two-thirty, I think.

State Rests. 12:05 P.M. Defense Rests.

Motion by Mr. Gadsden—see rulings of the Court, beginning middle of page 1. (Jury excused)

* * * * * * *

[fol. 63]

IN THE CITY COURT OF SAVANNAH

[Title omitted]

ORDER OF CONSOLIDATION—August 17, 1961

It appearing to the Court that the above stated cases were tried in the City Court of Savannah on May 18, 1961, and that all defendants therein were found guilty and sentenced by the Court to pay $100.00 or serve 5 months subject to the Board of Corrections of the State of Georgia.

It further appearing to the Court that Counsel for the Defendants filed a Motion for a New Trial for each and every defendant on the 23rd day of May, 1961, and that said Motion was set for hearing on June 23, 1961, the Honorable Columbus E. Alexander, Judge, then presiding, continued the hearing on said Motion until the 21st day of July, 1961, at which time said Motion and Brief of Evidence was submitted to the Court without argument of Counsel. Said Motions for New Trial were considered by the Court and on the 24th day of July, 1961, the Honorable Columbus E. Alexander, Judge of said Court, entered an Order overruling said Motions for New Trial on each and every ground.

It further appearing to the Court that the Judgment and sentence in said cases are predicated upon similar circumstances and facts and involve the same defensive pleas and same question of law.

It is therefore ordered by the Court that said cases be consolidated and proceed to hearing before the Supreme Court of Georgia as if all said cases had been originally brought as such.

In Open Court, this 17th day of August, 1961.

Columbus E. Alexander, Judge, City Court of Savannah, Chatham County, Georgia.

Filed in office this 17th day of August, 1961. Beatrice M. Gill, Dept. Clerk, City Court, Savannah.

* * * * * * *

[fol. 67]

IN THE SUPREME COURT OF GEORGIA

Case No. 21430

WRIGHT, et al.,

v.

THE STATE.

OPINION—November 9, 1961

By the Court:

1. A mere recital in the brief of the defendants of the existence of an assignment of error, without argument or citation of authorities in its support, and without a statement that it is insisted upon by counsel, is insufficient to save it from being treated as abandoned.

2. It is not error in a criminal case for the trial judge to refuse to direct a verdict of acquittal.

3. A demurrer which seeks to add facts not apparent on the face of the accusation must fail as a speaking demurrer.

4. A Code section utilizing terms with an established common-law meaning, and which is itself of common-law origin, is sufficiently definite to apprise a person of common intelligence with a standard which he may use in determining its command; this more than satisfies the requirements of due process.

5. An officer is not vested with arbitrary authority when he only makes an arrest, and it is left to judicial processes to ascertain if the described components of a criminal act are present.

Submitted October 9, 1961—Decided November 9, 1961—Rehearing denied November 21, 1961.

Unlawful assembly; constitutional question. Savannah City Court. Before Judge Alexander.

[fol. 68] The defendants, Nathaniel Wright, Charles L. Smart, Roscoe(?) White, James W. Thomas, Benjamin Carter, and Judson Ford, were brought to trial in the City Court of Savannah for violation of Code §26-5301 which reads "Unlawful assemblies.—Any two or more persons who shall assemble for the purpose of disturbing the public peace or committing any unlawful act, and shall not disperse on being commanded to do so by a judge, justice, sheriff, constable, coroner, or other peace officer, shall be guilty of a misdemeanor." The gravamen of the offense, as detailed in the accusation, was: "In that the said defendants did assemble at Daffin Park for the purpose of disturbing the public peace and refused to disburse (sic) on being commanded to do so by sheriff, constable, and peace officer, to wit: W. H. Thompson and G. W. Hillis."

Before their arraignment and before pleading to the accusation, the defendants filed a general demurrer to the accusation, contending that for five enumerated reasons the Code section above cited is unconstitutional. The trial judge overruled the general demurrer, and evidence was then introduced by the State at the conclusion of which counsel for the defendants made a motion to acquit. After the argument of counsel, in the absence of the jury, the trial judge denied the motion to acquit. The jury was recalled and, after argument of counsel and the charge of the court, returned a verdict of guilty. Whereupon the trial judge sentenced each defendant to pay a fine of $100 or to serve five months imprisonment, with the exception of the defendant Wright, who was sentenced to pay a fine of $125 or to serve six months imprisonment.

The defendants filed a motion for new trial which was subsequently overruled on each and every ground. The [fol. 69] trial judge then issued an order permitting the defendants' cases to be consolidated since all the cases were predicated upon identical circumstances and facts, and involved the same defensive pleas and the same questions of law.

The defendants excepted and assign error on the overruling of their general demurrer, the refusal by the trial judge to direct a verdict of acquittal, the denial of their

motion for a new trial, and on the judgment sentencing the defendants. Each of these assignments of error will be considered in order inverse from that in which it is above presented.

E. H. Gadsden, B. Clarence Mayfield, for plaintiffs in error. Andrew J. Ryan, Solicitor-General, Sylvan A. Garfunkel, contra.

[fol. 70] Quillian, Justice. 1. In their bill of exceptions the defendants assign error on the judgment sentencing each defendant (fourth ground) and on the denial of their motion for a new trial (third ground). However, in their brief to this court they completely omitted the fourth ground and merely referred to the third ground by asking: "Did the court commit error in overruling plaintiff's in error motion for new trial?" There was no argument, citation of authority, or statement that such grounds were still relied upon. Therefore, the applicable rule, as laid down in Henderson v. Lott, 163 Ga. 326 (2) (136 SE 403), is: "Assignments of error not insisted upon by counsel in their briefs or otherwise will be treated by this court as abandoned. A mere recital in briefs of the existence of an assignment of error, without argument or citation of authorities in its support, and without a statement that it is insisted upon by counsel, is insufficient to save it from being treated as abandoned." Almand v. Pate, 143 Ga. 711 (1) (85 SE 909); Head v. Lee, 203 Ga. 191, 202 (45 SE 2d 666); The B-X Corp. v. Jeter, 210 Ga. 250 (4) (78 SE 2d 790).

2. The second ground upon which the defendants rely is that the trial judge erred in failing to direct a verdict of acquittal for the defendants at the conclusion of the State's evidence. It is not error in a criminal case to refuse to direct a verdict of not guilty. Winford v. State, 213 Ga. 396, 397 (99 SE 2d 120); Williams v. State, 206 Ga. 107 (10) (55 SE 2d 589); Coleman v. State, 211 Ga. 704 (2) (88 SE 2d 381); Baugh v. State, 211 Ga. 863 (1) (89 SE 2d 504).

3. The first ground in the bill of exceptions is that the trial judge erred in overruling their general demurrers to the accusation. The defendants urge five contentions as [fol. 71] to why Code §26-5301, per se and as applied, violates rights secured to them by the Constitutions of the United States and of Georgia. Contentions (3) and (4) attack the Code section in question as unconstitutional as applied, since it was used to enforce racial discrimination, and as unconstitutional in that the arrest was pursuant to the policy, custom, and usage of the State of Georgia, which compels segregation of the races.

Neither of these two contentions can be ascertained from an examination of the accusation. A demurrer may properly attack only those defects which appear on the face of the petition, indictment, or, in this case, accusation. A demurrer which seeks to add facts not so apparent or to supply extrinsic matters must fail as a speaking demurrer. Jackson v. State, 64 Ga. 344; Arthur v. State, 146 Ga. 827 (92 SE 637). See also Walters v. State, 90 Ga. App. 360, 365 (83 SE 2d 48).

4. Contentions (1) and (2) attack the Code section, on its face, as violative of due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and by the Georgia Constitution, arguing that said Code section is so vague that the defendants are not placed on notice as to what criminal act they have allegedly committed, rendering it impossible to answer the charge or to make legal defense, and unconscionably vague in that nowhere in the statute does there appear a definition of disturbing the public peace or committing any unlawful act.

Since the defendants were charged only with "disturbing the public peace," the alleged vagueness of "committing any unlawful act" need not be considered. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (62 S. Ct. 766, 86 LE 1031); Whittle v. Jones, 198 Ga. 538, 544 (32 SE 2d 94); Kryder [fol. 72] v. State, 212 Ga. 272, 274 (91 SE 2d 612). Neither does the defendants' purported attack on the Code section under the Georgia Constitution raise any meritorious issue. In order to raise a question as to the constitutionality of a statute, the provision of the Constitution alleged to have

been violated must be clearly specified and designated, reference being made to the part, paragraph, or section. Clements v. Powell, 155 Ga. 278, 280 (8) (166 SE 624); Inlaw v. State, 168 Ga. 377 (1) (147 SE 881); Johns v. State, 18 Ga. 187, 188 (3) (178 SE 707); Manufacturers Trust Co. v. Wilby-Kincey Service Corp., 204 Ga. 273, 274 (49 SE 2d 514); Krasner v. Rutledge, 204 Ga. 380, 382 (49 SE 2d 864).

The United States Supreme Court has held that a statute is not unconscionably vague where its provisions employ words with a well-settled common-law meaning (Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 108-111, 29 S. Ct. 220, 53 LE 417); Nash v. United States, 229 U.S. 373, 376-378, 33 S. Ct. 780, 57 LE 1232; Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502, 45 S. Ct. 141, 69 LE 402), approved in Connally v. General Const. Co., 269 U.S. 385, 391 (46 S. Ct. 126, 70 LE 322); or is not couched in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Whitney v. California, 274 U.S. 357, 368 (47 S. Ct. 641, 71 LE 1095); Fox v. Washington, 236 U.S. 273, 276-278 (35 S. Ct. 383, 59 LE 573); Miller v. Strahl, 239 U.S. 426, 434 (36 S. Ct. 147, 60 LE 364); Omaechevarria v. Idaho, 246 U.S. 343, 348 (38 S. Ct. 323, 62 LE 763); United States v. Alford, 274 U.S. 264, 267 (47 S. Ct. 591, 71 LE 1040).

Here the term "disturbing the public peace" is of generic common law origin. Faulkner v. State, 166 Ga. 645, 665 (144 SE 193); 11 C.J.S. 817, §1. "Disturbing the peace" or its synonym, "breach of peace," has long been inherently [fol. 73] encompassed in our law and is prevalent in the various jurisdictions. 11 C.J.S. 817 et seq., §2 et seq.; 8 Am. Jur. 834 et seq., §3 et seq.

Further, the crime of unlawful assembly is itself of common-law origin, Reg. v. Pugh (1704), 87 Eng. Reprint 900, Rex v. Birt (1831), 172 Eng. Reprint 919, 91 C.J.S. 495, §1; 46 Am. Jur. 126, §2; is described in slightly varying forms in the vast majority of jurisdictions (Annot., 71 ALR 2d 875); and in our own State was codified in the Penal Code of 1816 (Ga. L. 1816, p. 178; Lamar's Comp. p. 592).

"The uncertainty in a statute which will amount to a denial of due process of law is not the difficulty of ascertaining whether close cases fall within or without the prohibition of the statute, but whether the standard established by the statute is so uncertain that it cannot be determined with reasonable definiteness that any particular act is disapproved; and a criminal statute is sufficiently definite if its terms furnish a test based on knowable criteria which men of common intelligence who come in contact with the statute may use with reasonable safety in determining its command." 163 A.L.R. 1108, Annotating Minnesota v. Lanesboro Produce Co., 221 Minn. 246 (21 NW 2d 792) (citing Nash v. United States, supra, United States v. Wurzbach, 280 U.S. 396, 50 S. Ct. 167, 74 LE 508, and Collins v. Com. of Kentucky, 234 U.S. 634, 34 S. Ct. 924, 58 LE 1510). The language of the Code section in question is pronounced in terms so lucid and unambiguous that a person of common intelligence would discern its meaning and apprehend with what violation he was charged. Farrar v. State, 187 Ga. 401 (200 SE 803); Fowler v. State, 189 Ga. 733 (8 SE 2d 77); Watson v. State, 192 Ga. 679 (16 SE 2d 426).

5. The last contention (5) assigned, that the Code sec- [fol. 74] tion confers untrammeled and arbitrary authority upon the arresting officer, has no merit since we have determined that the statute has a clear-cut standard to apprise one of what constitutes a criminal act and thus to guide the conduct of such officer. There is no usurpation of judicial authority, nor the improper delegation of judicial discretion, since the officer involved only makes the arrest when, in his discretion, he believes a crime to have been perpetrated. The innocence or guilt, beyond a reasonable doubt, of the accused must still be determined by judicial process.

This is a case of first impression in this State, and our research has failed to reveal any full-bench decisions from other jurisdictions on the exact question of the constitutionality of a similar unlawful-assembly statute. Nevertheless, see Cole v. Arkansas, 338 U.S. 345 (70 S. Ct. 172, 94 LE 155). However, by applying the well-recognized prin-

ciples and applicable tests above stated, we find no deprivation of the defendants' constitutional rights under the Fourteenth Amendment of the United States Constitution.

Judgment affirmed. All the Justices concur.

[fol. 75]

IN THE SUPREME COURT OF GEORGIA

JUDGMENT—November 9, 1961

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

NATHANIEL WRIGHT et al.,

v.

THE STATE.

This case came before this court upon a writ of error from the City Court of Savannah; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

[fol. 76]

IN THE SUPREME COURT OF GEORGIA

[Title omitted]

MOTION FOR REHEARING—Filed November 17, 1961

Now Come Nathaniel Wright, Charles L. Smart, Roscoe White, James W. Thomas, Benjamin Carter and Judson Ford, and within the time allowed by law, file this their Motion for Rehearing in the case stated, and for grounds thereof, say:

—1—

This Honorable Court seems to have completely disregarded the fact that the plaintiff's-in-Error were "peace-

ably" playing basketball at the time immediately preceding the arrest.

—2—

The arresting Officers testified that the arrest was made solely because the Plaintiff's-in-Error are Negroes.

—3—

The United States Constitution clearly imposes a prohibition upon a State from denying equal protection of the law to its Citizens.

—4—

An arrest based upon color without any supposed violation of the law constituted a deprivation of the Plaintiff's-in-Error constitutional rights under the Fourteenth Amendment of the United States Constitution.

[fol. 77]

—5—

The evidence shows beyond a reasonable doubt that the Plaintiffs-in-Error were not violating any law other than the fact that they were playing basketball in a municipally owned and operated "white" park, and there was no "breach of the peace" on the part of Plaintiffs-in-Error.

We respectfully submit that the Court, in its opinion in this case, has overlooked the essential fact that there was no disorder at any time on the part of the Plaintiffs-in-Error, either before or after the arrest.

Wherefore, your Petitioners pray that a rehearing be granted in this case, and the position of the Court reversed.

B. Clarence Mayfield, 458½ West Broad Street, Savannah, Georgia; E. H. Gadsden, 458½ West Broad Street, Savannah, Georgia, Attorneys for Plaintiffs-in-Error.

• • • • • • •

[fol. 80]

IN THE SUPREME COURT OF GEORGIA

Atlanta

ORDER DENYING MOTION FOR REHEARING—November 21, 1961

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

NATHANIEL WRIGHT et al.,

v.

THE STATE.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

[fol. 81] Clerk's Certificate (omitted in printing).

[fol. 82]

SUPREME COURT OF THE UNITED STATES

No. 729, October Term, 1961

NATHANIEL WRIGHT, et al., Petitioners,

vs.

GEORGIA.

ORDER ALLOWING CERTIORARI—June 25, 1962

The petition herein for a writ of certiorari to the Supreme Court of the State of Georgia is granted, and the case is transferred to the summary calendar. The case is set for argument to follow No. 750.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this petition.

[fol. 83]

IN THE CITY COURT OF SAVANNAH

Georgia,)
Chatham County.)

Criminal No. .....

Violation of Georgia Law 26-5301, Code of 1933, a Misdemeanor

---

STATE OF GEORGIA, Plaintiff,

vs.

NATHANIEL WRIGHT, et al., Defendants.

Tried in the City Court of Savannah, Chatham County, Georgia, before the Honorable Columbus E. Alexander, Judge of said Court, with a Jury.

APPEARANCES:

Sylvan A. Garfunkel, Esq., Asst. Solicitor General, Court House, Savannah, Ga., For State.

E. A. Gadsden, Esq., B. C. Mayfield, Esq., Attorneys at Law, Savannah, Georgia, For Defendants.

CHARGE OF THE COURT—Filed July 24, 1961

Judge Alexander:

Gentlemen of the jury, this is the case of the State versus six defendants. I will read them to you, and you will have this with you in your Jury Room when you retire: Nathaniel Wright, Charles L. Smart, Roscoe White, James W. Thomas, Andrew McArthur, and Judson Ford. You will notice one name, that I have circled, that is not being tried, you are not concerned with King not being tried today, so these six defendants are the defendants in this

case in which you are interested during the course of your [fol. 84] deliberation.

These defendants are charged with the violation of Georgia Law 26-5301, Code of Georgia of 1933, which is a Misdemeanor.

To these accusations, or to this accusation against these six defendants, the defendants enter a plea of not guilty, That puts in issue the averments contained in the accusation, as well as the guilt or the innocence of the defendants being tried in this case.

I charge you, gentlemen, that in all criminal cases the defendant (or defendants), if they desire to do so, shall have the right to make to the Court and jury such statement (or statements) of the case as they may deem proper in their defense, and such statement (or statements) shall have such force only as the jury may think right to give said statement (or statements), and they may believe the same in preference to the sworn testimony in the case.

I charge you further, gentlemen, that the burden is upon the State to prove the guilt of these defendants beyond a reasonable doubt; they entered upon the trial of these cases with the presumption of innocence in their favor and this presumption follows them throughout the trial unless and until sufficient evidence has been introduced by the State to satisfy your minds beyond a reasonable doubt of the guilt of these defendants of the charges contained in the accusation.

A reasonable doubt is one that grows out of the testimony or the lack of testimony—it is not an artificial or capricious doubt, but it should be real, honestly and fairly entertained by the jury after every reasonable effort to find out the truth of the case, and if at the end of your deliberation you have this character of doubt upon your minds you should give the defendants the benefit of it and acquit them, but, on the other hand, if you do not have such character of doubt upon your minds, and you believe that the State has made out the case as contained in the accusation under the evidence and under all the facts and circumstances of the case in its entirety beyond a reasonable doubt it will be your duty to convict the defendants.

[fol. 85] The true question in criminal cases is not whether it be possible that the conclusion to which the testimony points may be false, but whether there be sufficient testimony to satisfy your minds beyond a reasonable doubt that these defendants are guilty of the offenses charged in the accusations.

I further charge you, gentlemen of the jury, that you are the judges of both the law and the facts in cases of this nature; the law is given you in charge by the Court, the facts you get from the witnesses, who are sworn and who testify in the case, upon the statements of the defendants, from all the facts and circumstances of the case in its entirety, and during your deliberation you weigh the evidence of the case in the light of the law applicable to the case, as given you in charge by the Court.

As stated to you, in the beginning of this charge, these defendants are charged with the violation of Georgia Law, Code Section 26-5301 of the Georgia Code of 1933. More specifically, these defendants: Benjamin Carter, James W. Thomas, Roscoe White, Charles L. Smart, Judson Ford and Nathaniel Wright, are charged, that in Chatham County, Georgia, with the offense of a misdemeanor, in that said defendants, in said County and State, on the 23rd day of January of this year, in that said defendants did assemble at Daffin Park for the purpose of disturbing the peace and they refused to disperse on being commanded to do so by Sheriff, Constable and Peace Officers, to-wit: W. H. Thompson and G. W. Hillis, contrary to the laws of this State, the good order, peace and dignity thereof. I further charge you that this accusation is brought pursuant to Code Section 26-5301 of the 1933 Criminal Code of Georgia, the heading of the Section under which this accusation is brought is "Unlawful Assembly", and it reads as follows:

> "Any two or more persons, who shall assemble for the purpose of disturbing the public peace, or committing any lawful act, and shall not disperse on being com-
> [fol. 86] manded to do so by a Judge, Justice, Sheriff, Constable, Coroner, or any other Peace Officer, shall be guilty of a misdemeanor."

That is the law that these defendants are charged with violating, and further in connection with that I charge you that the term "Other Peace Officer", mentioned in this Section, would include police officers of the Police Department of the City of Savannah, Georgia.

That, gentlemen, is the law of the case. You are the judges of the facts and there is nothing left for me to do now except instruct you as to the form of your verdict.

If you find the defendants guilty the form of your verdict, in substance, should be: "We the jury find the defendants guilty"—see that your verdict is dated and signed by your foreman.

If you find the defendants not guilty the form of your verdict, in substance, should be: "We the jury find the defendants not guilty", see that your verdict is signed and dated by your foreman.

Thank you gentlemen, now you may retire and deliberate upon your verdict.

End of Charge

Reporter's Certificate to foregoing paper (omitted in printing).

[fol. 87] The above and foregoing 3 pages of typewritten material are approved as containing the correct charge as given the jury in the aforesaid case, and the same are hereby ordered filed as part of the record in said case.

This 24th day of July, 1961.

Columbus E. Alexander, Judge, City Court of Savannah.

[File endorsement omitted]

[fol. 88]

Violation of Georgia Law 26-5301, Code of 1933, a Misdemeanor

---

STATE OF GEORGIA,

vs.

NATHANIEL WRIGHT, et al.

I, Jeff F. Dickey, Clerk of the City Court of Savannah, do hereby certify that the attached and foregoing, is a true, correct and complete transcript of the Charge of the Court rendered by Judge Columbus E. Alexander, Judge of the City Court of Savannah at the trial of this case.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the City Court of Savannah this 23rd day of July, 1962.

Jeff F. Dickey, Clerk, City Court of Savannah, Georgia.

[SEAL]

Office-Supreme Court, U.S.
FILED
FEB 17 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 68

NATHANIEL WRIGHT, CHARLES L. SMART, RASCO WHITE, JAMES W. THOMAS, BENJAMIN CARTER, JUDSON FORD,

Petitioners,

—v.—

STATE OF GEORGIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

NATHANIEL WRIGHT, CHARLES L. SMART, RASCO WHITE, JAMES W. THOMAS, BENJAMIN CARTER, JUDSON FORD,

Petitioners,

—v.—

STATE OF GEORGIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered on November 9, 1961.

Citation to Opinion Below

The opinion of the Supreme Court of Georgia is reported in 122 S. E. 2d 737, and is set forth in the Appendix hereto, *infra* p. 1a, rehearing of which was denied, November 21, 1961.

Jurisdiction

The judgment of the Supreme Court of Georgia was entered on November 9, 1961 (R. 75); Appendix p. 9a, *infra*. Rehearing was denied November 21, 1961 (R. 80); Appendix p. 10a, *infra*. Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioners having asserted below and claiming here, denial of rights, privileges, and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Whether the conviction of the petitioners for unlawful assembly denied to them due process of law under the Fourteenth Amendment where they were convicted for being Negro and peacefully playing basketball in a municipally owned park customarily reserved for white persons, and the criminal statute under which they were convicted gave no notice that this constituted the crime of unlawful assembly.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Code of Georgia, Section 26-5301:

> "Unlawful Assemblies—Any two or more persons who shall assemble for the purpose of disturbing the public peace or committing any unlawful act, and shall not disperse on being commanded to do so by a judge, justice, sheriff, constable, coroner or other peace officer, shall be guilty of a misdemeanor."

Statement

Petitioners, six Negro young men, were arrested for "unlawful assembly"—assembling "for the purpose of disturbing the public peace or committing any unlawful act and . . . not dispers(ing) on being commanded . . ."—in the course of peacefully playing basketball in Daffin Park, Savannah, Georgia, a park in a "white" area (R. 56). "One reason [for the arrest] was because they were

Negroes" (R. 53). "It has been the custom to use the parks separately for the different races" (*Ibid.*). Colored children have played in Daffin Park, but not basketball (R. 53). There was no basketball court, as such, in any Negro park area until January 23, 1960 (R. 58). An arresting officer testified: "the defendants were playing basketball. They were not necessarily creating any disorder, they were just 'shooting at the goal', that's all they were doing, they wasn't disturbing anything" (R. 61).

The case first came to police "attention when this white lady had this conversation with us, the lady who told us that colored people were playing in the Basket Ball Court down there at Daffin Park, and that is the reason I went there, because some colored people were playing in the park. I did not ask this white lady how old these people were. As soon as I found out these were colored people I immediately went there" (R. 52). The officer " . . . arrested these people for playing basket ball in Daffin Park. One reason was because they were negroes" (R. 53). At the time "[t]hey were doing nothing besides playing basket ball, they were just normally playing basket ball . . ." (R. 53). "Under ordinary circumstances I [the officer] would not arrest boys for playing basketball in a public park" (R. 52).

Upon arrival the police first requested petitioners to leave. A petitioner asked who had ordered the police to the park (R. 51), to which an officer replied that they needed no orders (*Ibid.*). The purpose of the police in asking petitioners to leave was "to keep down trouble which looked to me [an officer] might start—there were five or six cars driving around the park at the time, white people" (R. 52) which was, however, " . . . not . . . unusual traffic for that time of day" (R. 53).

The Superintendent of the Recreational Department of Savannah testified that "we issue permits in all cases where we think there will be conflict, we try to regulate them" (R. 55), and that "if there was a conflict between the younger people and the older people using the park facilities the preference would be for the younger people to use them, but we have no objections to older people using the facilities if there are no younger people present or if they are not scheduled to be used by the younger people" (R. 55). But "there is no regulation for playing on a Court when it is not in use and there is no one around" (R. 57).

The evidence demonstrated no "conflict" (R. 55), and that there was "no one around" (R. 57). Grownups do use Daffin Park at certain times and under certain conditions. "[G]rownups could use [the basketball courts] if there was no other need for them" (R. 56). "[N]one of the children from the schools were there at that particular time" (R. 53).

Persons playing basketball would not have to wear any particular uniform if playing in an unregulated, unsupervised program; it would be consistent with Park Department policy to allow persons to wear ordinary clothing on the courts if they so chose (R. 56). Petitioners were well dressed in street clothing (R. 60).

While the Superintendent did not know whether the Department "had a planned program arranged for the day that these arrests were made, . . . normally they would not schedule anything for that time of the day because of the schools using the totals area there . . ." However, "if the schools were not there and were not using it and we had no program planned we certainly would not have been concerned about other people using it" (R. 58). In any event, the arrest and order to disperse were, in fact, not made because of some violation of the rules of the City Recreational Department because the arresting of-

ficer testified he didn't "know the rules of the City Recreational Department" (R. 52).

How the Federal Questions Were Raised and Decided Below

Prior to trial petitioners interposed a general demurrer in the City Court of Savannah raising four constitutional issues: Section 26-5301 of the Code of Georgia was so vague that they were not put on notice of what criminal act they had committed; that the statute did not sufficiently define disturbing the peace; and that as construed it was so vague as to place unlimited authority in the hands of police officers to arbitrarily designate acts to be held as criminal (R. 19-21) all in violation of the due process clause of the Fourteenth Amendment; and that the statute was applied to petitioners to enforce racial discrimination on governmentally owned facilities contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution. The trial judge overruled the demurrer on each and every ground (R. 21).

After the trial judge sentenced each of the petitioners, motion for new trial was filed (R. 26-27) in which the petitioners again objected that they were not fairly and effectively warned in Section 26-5301 Code of Georgia that their acts were prohibited, that the statute as construed was a delegation of arbitrary and capricious power to peace officers in violation of the due process clause of the Fourteenth Amendment.

The trial judge also overruled the motion for new trial on each and every ground (R. 29).

Petitioners on appeal to the Supreme Court of Georgia assigned as error in the bill of exceptions the overruling of the general demurrer and the motion for new trial (R. 1-8).

The Supreme Court of Georgia refused to consider the constitutional issues raised by objection to the overruling of the motion for new trial, because it deemed such objection abandoned:

> "In their bill of exceptions the defendants assign error on the judgment sentencing each defendant (fourth ground) and on the denial of their motion for a new trial (third ground). However, in their brief to this court they completely omitted the fourth ground and merely referred to the third ground by asking: 'Did the court commit error in overruling plaintiff's in error motion for new trial?' There was no argument, citation of authority, or statement that such grounds were still relied upon. Therefore, the applicable rule, as laid down in Henderson v. Lott, 163 Ga. 326(2) (136 SE 403), is: 'Assignments of error not insisted upon by counsel in their briefs or otherwise will be treated by this court as abandoned'" (R. 70).

The general demurrer also was held to be the improper means to raise two contentions that the statute had been applied to reinforce racial segregation of government facilities in violation of the equal protection clause of the Fourteenth Amendment (R. 71).

Under the demurrer the court below passed upon the only constitutional issue it held properly preserved, and ruled that the statute was not so vague as to deprive the petitioners of any constitutional rights under the Fourteenth Amendment:

> "The United States Supreme Court has held that a statute is not unconscionably vague where its provisions employ words with a well-settled common-law meaning" (R. 72).
>
> "Here the term 'disturbing the public peace' is of generic common-law origin" (R. 72).

> "The language of the Code section in question is pronounced in terms so lucid and unambiguous that a person of common intelligence would discern its meaning and apprehend with what violation he was charged" (R. 73).

Nor was there held to be any unconstitutional delegation of authority to a peace officer:

> "The last contention (5) assigned, that the Code section confers untrammelled and arbitrary authority upon the arresting officer, has no merit since we have determined that the statute has a clear-cut standard to apprise one of what constitutes a criminal act and thus to guide the conduct of such officer" (R. 74).

The judgment was affirmed.

Reasons for Granting the Writ

A. *Federal Questions Which the Court Below Unreasonably Refused to Decide Are Properly Reviewable by This Court.*

The question of whether the statute involved was so vague as not reasonably to apprise petitioners that their acts constituted an unlawful assembly in violation of the due process clause of the Fourteenth Amendment was properly before the Court below and, in affirming, the Supreme Court of Georgia disposed of petitioners' contentions adversely in a manner which presents them properly to this Court for review. Whether a Federal question was sufficiently and properly raised in the state court is itself a federal question, and this Court is not concluded by the view taken below. *First National Bank* v. *Anderson*, 269 U. S. 341. Federal rights are denied as well by a refusal of a state court to decide questions as erroneous decision of them. *Lawrence* v. *Mississippi*, 286 U. S. 276.

The question of vagueness presented by this petition was presented and pressed at successive stages of the litigation below, on demurrer, on motion for new trial, and motion for acquittal. While the State Supreme Court held that the issue as presented by demurrer was limited to the statute and accusations on their face, this, of course, cannot be alleged in connection with the motion for new trial which is designed to bring before the court the evidence at trial. *Sessions* v. *State*, 3 Ga. App. 13, 59 S. E. 196. The issue as raised by the motion for new trial, however, was held by the court below to have been waived because of the manner in which the point was briefed. Petitioners, however, have filed here certified copies of all briefs in the Supreme Court of Georgia which make it clear that the issue of vagueness as raised by the motion for new trial was in fact squarely presented to the Supreme Court of Georgia. See Brief of Plaintiffs in Error, p. 6 ("*Issues of Law* . . . (3) Did the Court Commit Error in Overruling Plaintiffs-in-Error Motion for New Trial?"). A common argument was submitted in support of the vagueness objection as it was raised in various stages of the case. (*Id.* at pp. 7-10). The brief was constructed in the form required by the Rules of the Georgia Supreme Court, Ga. Code Ann. 24-4515. While the brief commenced by stating "the principal question raised is whether or not the trial judge committed error in overruling the general demurrer," this was not claimed to be the only question raised. The attack on vagueness as raised under the motion for new trial was presented in the argument with clarity and specificity. The evidence was discussed in plaintiff-in-error's brief. The brief of defendant in error, a certified copy of which has also been filed here, is replete with discussion of the evidence and met plaintiff-in-error's arguments head on.

The essential purpose of the requirement that federal questions be raised in accordance with state procedure is to "enable the court as well as opposing counsel, readily to perceive what points are relied on", *Seaboard Air Line Ry.* v. *Watson*, 287 U. S. 86. The Georgia courts, both trial and appellate, and opposing counsel, were certainly apprised in due time with particularity of the petitioners' constitutional objections. It is only by a most restrictive and unreasonably strained construction that formal "judicial ignorance" can be made out. A construction of the state court as to the proper method of preserving federal questions will bind the Supreme Court "unless so unfair or unreasonable in its application to those asserting a Federal right as to obstruct it." *Central U. Telegraph Co. Edwardsville*, 269 U. S. 190, 195. As Mr. Justice Whittaker stated in *Staub* v. *Baxley*, 355 U. S. 313, 320, the finding of waiver of federal questions may not be based on wholly inadequate state grounds which would "force resort to an arid ritual of meaningless form." The decision below would make a greater fetish of the ritual of form than was demanded in *Staub*.

B. *Petitioners Were Denied Rights Guaranteed by the Fourteenth Amendment Because They Were Not Put on Notice by the Statute That the Acts They Participated in Were Criminal.*

This case involves the substantial question of whether a state may coerce conformity to a state pattern of segregation of the races on governmentally owned and operated recreational facilities by construing a broad and ambiguous criminal statute so as to make the use of these facilities by Negroes on the same basis as whites, a criminal act.

A statute, and any construction of it, must meet a minimum standard of prior warning of what is criminal conduct to avoid a charge of denial of due process of law

through vagueness. The applicable rule is stated in *Connally* v. *General Construction Company*, 269 U. S. 385, 391:

> "The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime and the element constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of a double meaning that the citizen may act upon one conception of its requirements and the Courts upon another."

Further, the standards of certainty in criminal cases must of necessity be higher than in those depending primarily upon civil sanctions for enforcement, *Winters* v. *New York*, 333 U. S. 507. In the instant case, petitioners could not possibly have anticipated that as Negroes, peacefully playing basketball in a municipally owned park is a criminal assembly to disturb the peace, as defined in the statute. The court below rejects the vagueness argument because the statute employs words with a well-settled common law meaning. However, in all of the cases cited to support this proposition the defendants' acts were at least reasonably within the long-established meaning of the statute. The only question in these cases was one of degree, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Nash* v. *U. S.*, 229 U. S. 373, 377. That Negroes would be charged with a criminal act for participating in the same activity deemed

lawful for whites on government property is not a question of degree, for it is not even colorably predictable by reading the statute under which petitioners were convicted.

A statute which does not lay down recognizable standards against which the discretion of those who administer it may be measured is unconstitutional and void. *Lovell* v. *Georgia*, 303 U. S. 444. As the Georgia Court has construed the statute, a police officer has unlimited power to designate any peaceful gathering as tending to disturb the peace. In this case he so chose to designate the act of Negroes playing basketball on a publicly owned court usually reserved for whites. Where *in fact* rankly unequal administration is sanctioned under the au[illegible] of a statute, such statute is vague on its face or a[illegible]d for lack of guide lines to prevent such arbitrary enforcement. *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496.

Petitioners had a right under the Fourteenth Amendment to utilize government facilities on the same basis as other citizens. They reasonably should have anticipated that the constitution would have been followed, rather than an unanticipated construction of Georgia law. Cf. *Mayor and City Council of Baltimore* v. *Dawson*, 350 U. S. 877. They could not have been deprived of access to any part of the municipal park even by a direct statute proscribing segregated areas. *Detiege* v. *New Orleans City Park Improvement Association*, 358 U. S. 54. This court has in many instances held that a statute is even more amenable to an attack of vagueness where its construction creates a danger of encroachment on constitutional rights and threatens to deter the exercise of these rights. *Saia* v. *New York*, 334 U. S. 558; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Kunz* v. *New York*, 340 U. S. 290.

As was said in *U. S.* v. *Clark Brewer*, 139 U. S. 278, "If the language of a statute is so general and indefinite

as to embrace not only acts properly and legally punishable but others *not punishable*, it will be voided for uncertainty." Here, the State of Georgia not only denies a constitutional right but attaches criminal sanctions to its exercise. This is accomplished through a novel construction of broad statute which in no wise gives prior warning that the recreational activities of Negroes in areas reserved for whites by the government are criminal acts.

C. *Petitioners' Convictions Denied Due Process of Law in That There Was No Evidence of the Essential Elements of the Crime Charged.*

The question presented below and brought to this Court, i.e., whether the statute under which petitioners were convicted is unconstitutionally vague in that it did not apprise them that being Negro and playing basketball in a white park constituted unlawful assembly is but another way of presenting the constitutional objection to this conviction under the doctrine of *Thompson* v. *City of Louisville*, 326 U. S. 199. In *Thompson* as in *Garner* v. *Louisiana*, 7 L. ed. 207 (1961), and any other case making the due process objection found in those cases, one convicted of crime without a shred of evidence that his activities were criminal under a statute always possesses a corollary constitutional objection that the statute did not and could not put him on notice that his conduct was criminal. Thus of necessity the judgments below complained of in this case are also constitutionally faulty for other reasons—discussed in *Thompson*—well established in the jurisprudence of our Constitution.

It is essential that this court grant certiorari to insure that its previous decisions prohibiting racially discriminatory action in violation of the due process and equal protection clauses of the Fourteenth Amendment will not be indirectly undermined or subverted.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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E. H. GADSEN

Attorneys for Petitioners

APPENDIX

SUPREME COURT OF GEORGIA

Case No. 21430

WRIGHT *et al.*,

—v.—

THE STATE.

Decided November 9, 1961.

By the Court:

1. A mere recital in the brief of the defendants of the existence of an assignment of error, without argument or citation of authorities in its support, and without a statement that it is insisted upon by counsel, is insufficient to save it from being treated as abandoned.

2. It is not error in a criminal case for the trial judge to refuse to direct a verdict of acquittal.

3. A demurrer which seeks to add facts not apparent on the face of the accusation must fail as a speaking demurrer.

4. A Code section utilizing terms with an established common-law meaning, and which is itself of common-law origin, is sufficiently definite to apprise a person of common intelligence with a standard which he may use in determining its command; this more than satisfies the requirements of due process.

5. An officer is not vested with arbitrary authority when he only makes an arrest, and it is left to judicial processes to ascertain if the described components of a criminal act are present.

Submitted October 9, 1961—Decided November 9, 1961—Rehearing denied November 21, 1961.

Unlawful assembly; constitutional question. Savannah City Court. Before Judge Alexander.

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The defendants, Nathaniel Wright, Charles L. Smart, Rosco (e?) White, James W. Thomas, Benjamin Carter, and Judson Ford, were brought to trial in the City Court of Savannah for violation of Code § 26-5301 which reads: "Unlawful assemblies.—Any two or more persons who shall assemble for the purpose of disturbing the public peace or committing any unlawful act, and shall not disperse on being commanded to do so by a judge, justice, sheriff, constable, coroner, or other peace officer, shall be guilty of a misdemeanor." The gravamen of the offense, as detailed in the accusation, was: "In that the said defendants did assemble at Daffin Park for the purpose of disturbing the public peace and refused to disburse (sic) on being commanded to do so by sheriff, constable, and peace officer, to wit: W. H. Thompson and G. W. Hillis."

Before their arraignment and before pleading to the accusation, the defendants filed a general demurrer to the accusation, contending that for five enumerated reasons the Code section above cited is unconstitutional. The trial judge overruled the general demurrer, and evidence was then introduced by the State at the conclusion of which counsel for the defendants made a motion to acquit. After the argument of counsel, in the absence of the jury, the

trial judge denied the motion to acquit. The jury was recalled and, after argument of counsel and the charge of the court, returned a verdict of guilty. Whereupon the trial judge sentenced each defendant to pay a fine of $100 or to serve five months imprisonment, with the exception of the defendant Wright, who was sentenced to pay a fine of $125 or to serve six months imprisonment.

The defendants filed a motion for new trial which was subsequently overruled on each and every ground. The

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trial judge then issued an order permitting the defendants' cases to be consolidated since all the cases were predicated upon identical circumstances and facts, and involved the same defensive pleas and the same questions of law.

The defendants excepted and assign error on the overruling of their general demurrer, the refusal by the trial judge to direct a verdict of acquittal, the denial of their motion for a new trial, and on the judgment sentencing the defendants. Each of these assignments of error will be considered in order inverse from that in which it is above presented.

E. H. Gadsden, B. Clarence Mayfield, for plaintiffs in error.

Andrew J. Ryan, Solicitor-General, Sylvan A. Garfunkel, contra.

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QUILLIAN, *Justice*: 1. In their bill of exceptions the defendants assign error on the judgment sentencing each defendant (fourth ground) and on the denial of their motion for a new trial (third ground). However, in their brief to this court they completely omitted the fourth ground and merely referred to the third ground by asking: "Did the court commit error in overruling plaintiff's in error

motion for new trial?" There was no argument, citation of authority, or statement that such grounds were still relied upon. Therefore, the applicable rule, as laid down in Henderson v. Lott, 163 Ga. 326 (2) (136 SE 403), is: "Assignments of error not insisted upon by counsel in their briefs or otherwise will be treated by this court as abandoned. A mere recital in briefs of the existence of an assignment of error, without argument or citation of authorities in its support, and without a statement that it is insisted upon by counsel, is insufficient to save it from being treated as abandoned." Almand v. Pate, 143 Ga. 711 (1) (85 SE 909); Head v. Lee, 203 Ga. 191, 202 (45 SE 2d 666); The B-X Corp. v. Jeter, 210 Ga. 250 (4) (78 SE 2d 790).

2. The second ground upon which the defendants rely is that the trial judge erred in failing to direct a verdict of acquittal for the defendants at the conclusion of the State's evidence. It is not error in a criminal case to refuse to direct a verdict of not guilty. Winford v. State, 213 Ga. 396, 397 (99 SE 2d 120); Williams v. State, 206 Ga. 107 (10) (55 SE 2d 589); Coleman v. State, 211 Ga. 704 (2) (88 SE 2d 381); Baugh v. State, 211 Ga. 863 (1) (89 SE 2d 504).

3. The first ground in the bill of exceptions is that the trial judge erred in overruling their general demurrers to the accusation. The defendants urge five contentions as to why Code § 26-5301, per se and as applied, violates rights

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secured to them by the Constitutions of the United States and of Georgia. Contentions (3) and (4) attack the Code section in question as unconstitutional as applied, since it was used to enforce racial discrimination, and as uncon-

stitutional in that the arrest was pursuant to the policy, custom, and usage of the State of Georgia, which compels segregation of the races.

Neither of these two contentions can be ascertained from an examination of the accusation. A demurrer may properly attack only those defects which appear on the face of the petition, indictment, or, in this case, accusation. A demurrer which seeks to add facts not so apparent or to supply extrinsic matters must fail as a speaking demurrer. Jackson v. State, 64 Ga. 344; Arthur v. State, 146 Ga. 827 (92 SE 637). See also Walters v. State, 90 Ga. App. 360, 365 (83 SE 2d 48).

4. Contentions (1) and (2) attack the Code section, on its face, as violative of due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and by the Georgia Constitution, arguing that said Code section is so vague that the defendants are not placed on notice as to what criminal act they have allegedly committed, rendering it impossible to answer the charge or to make legal defense, and unconscionably vague in that nowhere in the statute does there appear a definition of disturbing the public peace or committing any unlawful act.

Since the defendants were charged only with "disturbing the public peace," the alleged vagueness of "committing any unlawful act" need not be considered. Chaplinsky v. New Hampshire, 315 U. S. 568, 572 (62 S. Ct. 766, 86 LE 1031); Whittle v. Jones, 198 Ga. 538, 544 (32 SE 2d 94); Kryder v. State, 212 Ga. 272, 274 (91 SE 2d 612).

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Neither does the defendants' purported attack on the Code section under the Georgia Constitution raise any meritorious issue. In order to raise a question as to the constitu-

tionality of a statute, the provision of the Constitution alleged to have been violated must be clearly specified and designated, reference being made to the part, paragraph, or section. Clements v. Powell, 155 Ga. 278, 280 (8) (166 SE 624); Inlaw v. State, 168 Ga. 377 (1) (147 SE 881); Johns v. State, 180 Ga. 187, 188 (3) (178 SE 707); Manufacturers Trust Co. v. Wilby-Kincey Service Corp., 204 Ga. 273, 274 (49 SE 2d 514); Krasner v. Rutledge, 204 Ga. 380, 382 (49 SE 2d 864).

The United States Supreme Court has held that a statute is not unconscionably vague where its provisons employ words with a well-settled common-law meaning (Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 108-111, 29 S. Ct. 220, 53 LE 417); Nash v. United States, 229 U. S. 373, 376-378, 33 S. Ct. 780, 57 LE 1232; Hygrade Provision Co. v. Sherman, 266 U. S. 497, 502, 45 S. Ct. 141, 69 LE 402), approved in Connally v. General Const. Co., 269 U. S. 385, 391 (46 S. Ct. 126, 70 LE 322); or is not couched in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Whitney v. California, 274 U. S. 357, 368 (47 S. Ct. 641, 71 LE 1095); Fox v. Washington, 236 U. S. 273, 276-278 (35 S. Ct. 383, 59 LE 573); Miller v. Strahl, 239 U. S. 426, 434 (36 S. Ct. 147, 60 LE 364); Omaechevarria v. Idaho, 246 U. S. 343, 348 (38 S. Ct. 323, 62 LE 763); United States v. Alford, 274 U. S. 264, 267 (47 S. Ct. 591, 71 LE 1040).

Here the term "disturbing the public peace" is of generic common-law origin. Faulkner v. State, 166 Ga. 645, 665 (144 SE 193); 11 C. J. S. 817, § 1. "Disturbing the peace" or its synonym "breach of peace," has long been inherently encompassed in our law and is prevalent in the v[illegible]us

jurisdictions. 11 C. J. S. 817 et seq., § 2 et seq.; 8 Am. Jur. 834 et seq., § 3 et seq.

Further, the crime of unlawful assembly is itself of common-law origin, Reg. v. Pugh (1704), 87 Eng. Reprint 900, Rex v. Birt (1831), 172 Eng. Reprint 919, 91 C. J. S. 495, § 1; 46 Am. Jur. 126, § 2; is described in slightly varying forms in the vast majority of jurisdictions (Annot., 71 ALR 2d 875); and in our own State was codified in the Penal Code of 1816 (Ga. L. 1816, p. 178; Lamar's Comp. p. 592).

"The uncertainty in a statute which will amount to a denial of due process of law is not the difficulty of ascertaining whether close cases fall within or without the prohibition of the statute, but whether the standard established by the statute is so uncertain that it cannot be determined with reasonable definiteness that any particular act is disapproved; and a criminal statute is sufficiently definite if its terms furnish a test based on knowable criteria which men of common intelligence who come in contact with the statute may use with reasonable safety in determining its command." 163 A. L. R. 1108, Annotating Minnesota v. Lanesboro Produce Co., 221 Minn. 246 (21 NW 2d 792) (citing Nash v. United States, supra, United States v. Wurzbach, 280 U. S. 396, 50 S. Ct. 167, 74 LE 508, and Collins v. Com. of Kentucky, 234 U. S. 634, 34 S. Ct. 924, 58 LE 1510). The language of the Code section in question is pronounced in terms so lucid and unambiguous that a person of common intelligence would discern its meaning and apprehend with what violation he was charged. Farrar v. State, 187 Ga. 401 (200 SE 803); Fowler v. State, 189 Ga. 733 (8 SE 2d 77); Watson v. State, 192 Ga. 679 (16 SE 2d 426).

5. The last contention (5) assigned, that the Code sec-
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tion confers untrammelled and arbitrary authority upon the arresting officer, has no merit since we have determined that the statute has a clear-cut standard to apprise one of what constitutes a criminal act and thus to guide the conduct of such officer. There is no usurpation of judicial authority, nor the improper delegation of judicial discretion, since the officer involved only makes the arrest when, in his discretion, he believes a crime to have been perpetrated. The innocence or guilt, beyond a reasonable doubt, of the accused must still be determined by judicial process.

This is a case of first impression in this State, and our research has failed to reveal any full-bench decisions from other jurisdictions on the exact question of the constitutionality of a similar unlawful-assembly statute. Nevertheless, see Code v. Arkansas, 338 U. S. 345 (70 S. Ct. 172, 94 LE 155). However, by applying the well-recognized principles and applicable tests above stated, we find no deprivation of the defendants' constitutional rights under the Fourteenth Amendment of the United States Constitution.

Judgment affirmed. All the Justices concur.

SUPREME COURT OF GEORGIA

21430

ATLANTA, November 9, 1961

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

NATHANIEL WRIGHT *et al.*,

—v.—

THE STATE.

This case came before this court upon a writ of error from the City Court of Savannah; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

All the Justices concur.

SUPREME COURT OF GEORGIA

21430

ATLANTA, November 21, 1961

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

NATHANIEL WRIGHT *et al.*,

—v.—

THE STATE.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

No. 68

NATHANIEL WRIGHT, CHARLES L. SMART, RASCO WHITE, JAMES W. THOMAS, BENJAMIN CARTER, JUDSON FORD,
Petitioners,
vs.
STATE OF GEORGIA.

BRIEF

Of Respondent in Opposition to Granting of Writ of Certiorari to Review Judgment of Supreme Court of Georgia.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 729.

NATHANIEL WRIGHT, CHARLES L. SMART, RASCO WHITE, JAMES W. THOMAS, BENJAMIN CARTER, JUDSON FORD,
Petitioners,
vs.
STATE OF GEORGIA.

BRIEF

Of Respondent in Opposition to Granting of Writ of Certiorari to Review Judgment of Supreme Court of Georgia.

Respondent respectfully contests the statement of the question presented and the statement of facts as outlined by the petitioners. The petitioners have not given a sufficiently complete resumé of the record of the Brief of Evidence for the Court to determine the question of discrimination on account of race.

We respectfully bring to the Court's attention the testimony of the Police Officer who made the arrest (R. 51): "as a result of the conversation with this white lady we rode over to this Basket Ball Court we found around seven colored boys playing basket ball there on the Basket

Ball Court . . . As to their dress, they were pretty well dressed at that time; some of them had on dress shirts, some of them had on coats—not a dress coat, but a jacket. I didn't notice what particular type shoes they had on, as far as I know they didn't have 'tennis shoes' on. I am familiar with the type of shoes that people wear when they play basket ball, they didn't have that type of shoes on as well as I remember.

"I think that these defendants ranged in age from 23 to 32.

"There is a school nearby this Basket Ball Court, it is located at Washington Avenue and Bee Road, I mean, at Washington Avenue and Waters. There is another school on 44th Street—there are two schools nearby; I believe they are both 'grammar' schools. I patrol that area and the children from these schools play there, they come there every day I believe, I believe they come there every afternoon when they get out of school, and I believe they come there during recess. The school, I believe, gets out about 2:30 in the afternoon, and this was around 2:00 o'clock.

"When I came up to these defendants I asked them to leave; I spoke to all of them as a group when I drove up there, and I asked them to leave twice, but they did not leave at that time. I gave them an opportunity to leave. One of them, I don't know which one it was, came up and asked me who gave me orders to come out there and by what authority I came out there, and I told him that I didn't need any orders to come out there, I believe the one that asked me that is the third one there, sitting at the table in the Court Room here, the one there with the coat on, with the red button on it. The children from the schools, would have been out there shortly after that. The purpose of asking them to leave was to keep down

trouble, which looked like to me might start—there were five or six cars driving around the park at the time, white people. They left only after they were put under arrest, they were put under arrest approximately 5 to 10 minutes after I told them to leave—Officer Hillis is the one who put them under arrest—we called the police cruiser and it came and we put them in that. It seemed like to me that they were welcoming the arrests, because all of them piled into the car, Officer Hillis' car, at the time, and he had to stop them—Officer Hillis' car did not carry any of them, the cruiser carried them in, they waited in the car until the cruiser came, all seven of them, it was seven of them."

The State questioned the bona-fides of these defendants playing basket ball or whether they were there to try and create an incident. Further examination of the arresting officer revealed the following (R. 53):

"I believe that most of them had on dress pants, as far as I can remember. I have seen people playing basket ball, but I have never seen them come out dressed like that to play basket ball."

In regard to whether these defendants were arrested solely because they were negroes playing in a park in a white area, the arresting officer testified as follows (R. 53):

"There have been colored children in Daffin Park, but I did not arrest those children, but I arrested these people because we were afraid of what was going to happen. Colored children have played in Daffin Park, and they have fished there."

In order to develop what is the park playground policy, Carl Hager who identified himself as Superintendent of

the Recreational Department of the City of Savannah, was sworn and testified. We quote from the brief of his testimony (R. 54 and 55):

> "As superintendent I am over all of the playgrounds in the City of Savannah, Chatham County, Georgia; that includes Daffin Park and all the other parks that have playgrounds. These playgrounds are mostly in neighborhood areas. There are neighborhood areas where colored families live, and neighborhood areas where white people live, we try to establish them in that manner, and, then, there are certain areas where they are mixed to a certain extent. We have a playground in the Park Extension, and that is a mixed area for white and colored—a white section and a colored section—it is mostly white, but there are several colored sections within several blocks, and they are much closer now than they used to be. Wells Park is what we call a border-area and that is a mixed area—one side is colored and one side is white. The Daffin Park area, mostly around that area is mostly white. It has occurred, from time to time, that colored children would play in the Daffin Park area and in the Park Extension area, but no action has been taken, because it is legal, it is allowed, and nobody has said anything about it. I am familiar with the Daffin Park playground area, in fact, the office of the Recreational Department is in Daffin Park. That basket ball court is about a block from the office. I was advised that an arrest had been made, but they had all gone when I was told about it and I did know why the arrests had been made. The playground areas are basically for young children, say 15 to 16 and under, along that age group, we give priority to the playground to the younger children over the grownups, it made no difference as to whether

they were white or colored. Any time that we requested anyone to do something and they refused we would ask the police to step in, if we would ask them to leave and they did not we would ask the police to step in. We have had reports that colored children have played in the Park Extension but they were never arrested or told to leave.

"We have had grown people to come out to Daffin Park and play soft-ball; we have soft-ball diamonds and also younger people play on them, but we try to regulate the times for playing on the diamonds so that there will not be a conflict between the older people and the younger ones, and we issue permits in all cases where we think there will be conflict, we try to regulate them. We do not have the Tennis Courts regulated at the present time, they are now on first come first serve basis, but we plan to regulate these."

On cross-examination Mr. Hager said (R. 55):

"I testified that if there was a conflict between the younger people and the older people using the park facilities the preference would be for the younger people to use them, but we have no objections to older people using the facilities if there are no younger people present or if they are not scheduled to be used by the younger people."

He was also questioned as to whether they would allow colored citizens to play in a park in a white area. His answer was as follows (R. 56):

"It has been the custom to use the parks separately for the different races. I couldn't say whether or not a permit would or would not be issued to a person of color if that person came to the office of the Recreational Department and requested a permit to play

on the courts, but I am of the opinion that it would have been, we have never refused one, the request never has been made."

On further cross-examination he explained their rule in regard to age limits on basketball courts (R. 57):

"There is no minimum or maximum age limit for the use of basketball courts, however, at the present time we have established a minimum—a maximum age limit of 16 years for any playground area. Programming is not so readily understood by lay people, by age grouping is taken into consideration in programming because we don't want the older people competing with the younger people, and we don't like to have them associating because we don't think that a younger person should learn too much from the older person or vice versa, we don't think it conducive to good community relations, the building of character and the proper traits for younger people, and I think the school systems have followed somewhat the same procedure in segregating them in age groups, such as the younger school groups, the junior highs, and the high schools, and it is for the same purpose that we regulate our programs according to age groups and, sometimes, sexes also, and all of this is in accordance with, basically, a planned program."

On further redirect examination Mr. Hager explained the use of this particular playground at the particular time when the arrest was made (R. 57):

"On school days these courts and the playground area at Daffin Park are available for only certain age groups and they are only used at that time of day by the schools in that vicinity, it is, more or less, left available for them, that is the way we have our recreation set up."

Mr. Hager then on further redirect examination explained the pattern of arranging playground areas in various neighborhoods (R. 57):

"Most of our playground areas are arranged according to the families living in that particular area, playgrounds where there are white families and playgrounds where there are colored families—most of them are arranged in that manner according to the areas. We do feel this, that the playgrounds are established within a distance of one mile of the people who are expected to use them, and normally when we find that when a playground is established with that in mind that people who live within one mile of it will use it, so if we put one in a predominantly negro neighborhood, then, predominantly negroes would use it, and the same would be true for the whites, but, of course, we can't always control that because we do not have the choice of locations where we would like to have them, and that is the reason why some could very easily become mixed areas, such as Park Extension, because that is within a mile of both white and colored, and that is the reason why both play in that area.

"I don't know whether or not we have a planned program arranged for the day that these arrests were made, I would have to check my records. We do not have parks in colored areas that are comparable in size or comparable in facilities to Daffin Park, but colored boys do fish in the pond at Daffin Park. The size of the facilities would be determined by the area. Cann Park is probably our most complete area that is in a colored neighborhood, and on that we have a tennis court—and we use that court for basketball, we have swings, slides, [illegible]ft ball field, a small practice field, which is also used for football, and it also has

a concrete spray pool, picnic table, and a few other odds and ends of equipment, and it has a drinking fountain, and things of that nature, which would make it about as well equipped as any playground we have except for size."

The key question was then asked on recross-examination by defendants' attorney (R. 58), the question being "If your planned program did not have the 23rd of January 1961 set aside for any particular activity would it have been permissible to use this basketball court in Daffin Park in the absence of children?" The answer being as follows:

"I can't very well answer that question because you have several questions in one. First, I would like to say that normally we would not schedule anything for that time of the day because of the schools using the total area there and, second, I would not know whether we had something scheduled without referring to my records. Now if the schools were not there and were not using it and we had no program planned we certainly would not have been concerned about other people using it. The schools use the area during school hours. The Parochial School uses it during recess and lunch periods and also for sport, as also the Lutheran School, and the public schools bring their students out there by bus and at various times during school hours all day long, we never know when they are coming, and they use Cann Park the same way, I might add.

"If it was compatible to our program we would grant a permit for the use of the basketball court in Daffin Park to anyone regardless of race, creed or color, however, at that time of day it would not be compatible to our program. If that basketball court was not scheduled it would be compatible with our

program for them to use it, and we would not mind them using it. If there was a permit issued there would be no objections as to race, creed or color."

Officer G. W. Hillis, who was also with Officer Thompson, the arresting officer, at the time of the arrest, corroborated the statement of Officer Thompson (R. 60) as follows:

"I was on duty around two o'clock on the afternoon of the date in the vicinity of Daffin Park, here in Savannah, Chatham County, Georgia, at around that time I received some information from a white lady, as a result of that information I went with Officer Thompson, in a police automobile, to the basketball court in Daffin Park, here in Savannah, Chatham County, Georgia. When I arrived there I saw the defendants, they were playing basketball. Officer Thompson talked to them first, and then I talked to them. I asked them to leave, Officer Thompson had already asked them, I heard him ask them. They did not leave, and they did not stop playing until I told them they were under arrest. We called the wagon (cruiser). Officer Thompson told them that they would have to leave, he told them that at first, and they did have an opportunity to leave after he told them that. He asked them twice to leave, and then I asked them to leave after I saw they wasn't going to stop playing, and when I asked them to leave one of them made a sarcastic remark, saying: 'What did he say, I didn't hear him', he was trying to be sarcastic. When I told them to leave there was one of them who was writing with a pencil and looking at our badge numbers. They all had an opportunity to leave before I arrested them, plenty of time to have left, but I told them to leave, they wouldn't leave and I put them under arrest."

There was no evidence introduced by the petitioners that the testimony of the State's witnesses was incorrect or false. The question presented to the Court by the petitioners does not express a proper state of the record since the record shows that the defendants were not arrested solely for being negroes peacefully playing basketball in a public park customarily reserved for white persons.

The defendants were grown men ranging in age from 23 to 32 years of age who went upon a playground in a public park during school hours, dressed in dress shirts, dress pants and wearing leather shoes. At this time, the place was reserved for and had been used and was scheduled to be used by grammer school children from two nearby schools as part of their physical education program. The fact that these defendants were adult negro men on a children's playground in a white residential area and that cars were beginning to assemble all contributed to a fear that there would be a breach of the peace if the defendants continued to use the playground.

They were requested to leave, given every opportunity to do so but continued to play and to all appearances welcomed the arrests.

The petitioners give as the first reason for granting the writ that the Court below unreasonably refused to decide Federal questions which are properly reviewable by the Supreme Court. The Georgia Supreme Court held that under their rules the assignment of error on the judgment sentencing each defendant and on denial of their motion for a new trial which are the third and fourth grounds of the Bill of Exceptions were abandoned under the rule laid down in Henderson v. Lott, 163 Ga. 326 (2) (136 S. E. 403) and other cases cited in their decision. The petitioners argue that the point was properly raised and briefed. It has been held many times by this Supreme

Court that a State Court has the power to decide the proper method of preserving Federal questions and this determination will bind this Supreme Court. Herndon v. Georgia, 295 U. S. 441; Parker v. Illinois, 333 U. S. 571; Edelman v. California, 344 U. S. 357; Michel v. Louisiana, 350 U. S. 91. In all of these cases this Court deferred to a state court's determination of its own procedural rules.

We recognize that this Supreme Court will inquire into the adequacy of a decision on state procedural grounds to determine whether the procedural application involved was inconsistent with prior decided cases. We respectfully show that this was the question that was decided in Staub v. City of Baxley, 355 U. S. 313 which is cited by the petitioners. In that case the petitioner was able to show the Court that in other cases the Georgia Supreme Court had ruled differently in regard to the procedural rule that it used in the Staub case, the petition thus invoked a question of discrimination against Staub. In the recent case of Wolfe v. North Carolina, 364 U. S. 177, this Court again affirmed the doctrine.

Petitioners have not cited to this Court one Georgia case to show that the rule laid down in Henderson v. Lott, supra, has been inconsistently applied. We therefore feel that under the rules of this Court, this question has been finally disposed of in the Supreme Court of Georgia.

In sub-paragraph B, on reasons for granting the writ, petitioners state the Statute is in violation of rights granted by the Fourteenth Amendment on the grounds it was too vague to put them on notice that the acts participated in were criminal.

In the recent case of Garner v. Louisiana, 7 Law. Ed. (2) 207, 216 this Supreme Court held that: "We are aware that the Louisiana Courts have final authority to interpret and where they see fit, to reinterpret that state's

legislation." However, in that case the Supreme Court of Louisiana had not finally determined the question involved. That case also involved the interpretation of a breach of the peace statute. The Supreme Court also said at page 215: "We, of course are bound by a state's interpretation of its own statute and will not substitute our judgment for that of the state's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court."

To be guilty of violation of the Georgia Statute, three things are necessary: (1) There must be two or more persons assembled; (2) the purpose must be for disturbing the public peace or committing any unlawful act; (3) they shall not disperse on being commanded to do so by a Judge, peace officer, etc.

This Supreme Court has also held in Cantwell v. Connecticut, 310 U. S. 300, 84 L. Ed. 1213-1220 that:

> "One may be guilty of the common law offense of breach of the peace if he commits acts or makes statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended."

Thus it is not necessary to show whether the petitioners actually intended to create a threat of the breach of the peace to convict them. But it was necessary for the prosecution to show that more than one person was involved; that there was a threatened breach of the peace or an assembly for the commission of any unlawful act, and that they refused to disperse upon being requested to do so by the police officer. To make this act criminal under the Georgia Statute, all three of these facts must be present. The fact that they shall be given the opportunity to

disperse is an additional safe-guard to prevent a person from being arrested at the whim of a police officer.

We have quoted extensively from the Brief of Evidence in order to thoroughly show the Court the circumstances under which these arrests were made.

The petitioners have consistently tried to argue that the sole reason for their arrests was because they were negroes, and that no negroes would be allowed in the park. The uncontradicted evidence of the police officers showed that negro children had played in the park and had not been disturbed. The Superintendent of the Recreational Department of the city testified that negro children have played in Daffin Park and in the Park Extension and were never arrested or told to leave on the grounds they were colored. The recreational superintendent further stated the grounds for asking these defendants to leave was because they were adults and that priority for use of the playground was given to children over grown-ups, and it made no differences whether they were white or they were colored. The superintendent also stated if the basketball court was not scheduled, it would be compatible with their program for them to use it, and they would not mind them using it and there would be no objection raised as to race, creed or color. Yet in view of this sworn testimony, without a thread of evidence to prove that the witnesses were not telling the truth, these petitioners would have this Court believe that they were being denied the right to use this park because of their race.

What these petitioners would have this Court find is that they constitute a special group entitled to special privileges which other people, similarly situated, would not have. This Court has held that no one can be denied use of a public park because of his race, but certainly restrictions as to age without regard to race with a reason-

able explanation why such rules have been promulgated, can be enforced against these defendants in the same manner as they could have been enforced against any other adults who may have come upon the playground at the same time of day and refused to leave when requested to do so by police officers.

We respectfully request that the writ of certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1961

No. [redacted] 68

NATHANIEL WRIGHT, CHARLES L. SMART, RASCO WHITE, JAMES W. THOMAS, BENJAMIN CARTER, JUDSON FORD,

Petitioners,

—v.—

STATE OF GEORGIA,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners have received respondent's Brief in Opposition to the Petition for Writ of Certiorari filed in this case and hereby reply pursuant to Rule 24(4) of the Rules of this Court.

I.

Mode of Raising Constitutional Questions

Respondent argues that where a state court has declined to pass upon a constitutional question for alleged failure to raise the question properly this Court may pass upon it only where the state has applied the procedural rule inconsistently. But this Court has in many instances found such refusal unreasonable for reasons other than incon-

sistent application. *Terre Haute I. R. Co.* v. *Indiana*, 194 U. S. 579, 589; *Union P. R. Co.* v. *Public Service Commission*, 248 U. S. 67 and *Staub* v. *Baxley*, 355 U. S. 313.

As in *Staub*, the mode of avoiding the constitutional question here presented also fails to meet a bare minimum of intrinsic fairness and reasonableness. This Court never has been precluded from examining the particular application of a state procedural rule to assure that it is not in essence an evasion of the federal questions on frivolous grounds. *Rogers* v. *Alabama*, 192 U. S. 226, 230 and *Van Dalia R. R. Co.* v. *Indiana, ex rel. South Bend*, 207 U. S. 359, 367.

Statement of the Facts

Despite State efforts to characterize the arrests as having nothing to do with the race of the petitioners, the fact remains that the arresting officer testified "one reason [for the arrest] was because they were Negroes" (R. 53). Moreover, respondent also concedes squarely in its brief the very fact it claims was not made out by the record, that the race of petitioners was the material factor in the arrest:

> The fact that these defendants were adult Negro men on a children's playground in a white residential area and that cars were beginning to assemble all contributed to a fear that there would be a breach of the peace if the defendants continued to use the playground. (Brief in Opposition, p. 10.)

The fact that it is a crime in Georgia for Negroes to play on a white basketball court, although the statute gives no fair warning thereof, is what—in this context—renders the law vague. Petitioners were not warned in any manner of potential differential treatment solely because of race.

Respondent alleges another cause for the arrests: that petitioners violated the Recreational Department's rules. This allegation distorts the record. The arresting officer did not "know the rules of the city's recreational department" (R. 52). He came to the basketball court solely because he was told by a "white lady" that some "colored people were playing in the basketball court" (R. 52). He had no information at that point that any infraction of playground rules was occurring (R. 52) nor did he testify that he saw any such infraction upon arriving at the scene.

Respondent states that the testimony of the superintendent of the recreational department shows that petitioners were arrested because they were "grown men" on a "children's playground" and were dressed in street clothes.[1] This witness's testimony is to the contrary. He testified that under the rules of the Recreation Department the basketball courts could be used by adults (R. 56) (and, therefore, the petitioners were not on a playground exclusively for children), and that it would not be improper to wear street clothes in unsupervised play (R. 56). He further testified that although the school used the area during school days, the courts could be used by anyone if children were not actually there (R. 58). The arrests were made at 2:00 in the afternoon when the children were not present but were in school (R. 53). Mr. Hager's general comments that the Recreation Department might employ a nondiscrimination policy could not change the character of the arrests as attempts to enforce segregation because his office had intervened in no way (He learned of the arrests after they had been made [R. 54]), and the arresting officer was not aware of the Recreation Department's rules (R. 52).

---

[1] Respondent's brief, p. 10, 2nd paragraph and see p. 13, 2nd paragraph.

Even if the respondent had been able to establish that the one ground for the arrests was violation of playground rules, this could not sustain the judgment below in the face of clear rulings by this Court for one basis of the conviction was race. And as stated in *Williams* v. *North Carolina*, 317 U. S. 287, 292, "[I]f one of the grounds for conviction is invalid under the Federal Constitution, the conviction would not be sustained."

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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BRIEF FOR PETITIONERS

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IN THE

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GEORGIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Supreme Court of Georgia is reported at 217 Ga. 453, 122 S. E. 2d 737 (1961) (R. 52).

Jurisdiction

The judgment of the Supreme Court of Georgia was entered on November 9, 1961 (R. 58). Rehearing was denied November 21, 1961 (R. 60). The petition for certiorari was filed February 17, 1962, and was granted on June 25, 1962. Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioners having asserted below and claiming here, denial of rights, privileges, and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Georgia Code Annotated, Section 26-5301:

> Unlawful Assemblies—Any two or more persons who shall assemble for the purpose of disturbing the public peace or committing any unlawful act, and shall not disperse on being commanded to do so by a judge, justice, sheriff, constable, coroner, or other peace officer, shall be guilty of a misdemeanor.

Questions Presented

I.

Whether the conviction of petitioners for unlawful assembly denied them due process of law under the Fourteenth Amendment, where they were convicted on no evidence of guilt, or merely because they were Negroes who peacefully played basketball in a municipal park customarily used only by white persons, under a statute which was drawn in sweeping and general terms and which gave no warning that such conduct was prohibited.

II.

Whether the decision below asserts any adequate nonfederal ground for limiting consideration of an aspect of an important constitutional right where the court below unjustifiably determined that such right had been abandoned.

Statement

Petitioners, six young Negro men ranging from 23 to 32 years of age (R. 39) in Savannah, Georgia, have been charged and convicted of the crime of unlawful assembly, a misdemeanor, in violation of §26-5301, Georgia Code Annotated. It was charged, in an accusation signed by the Solicitor General of the Eastern Judicial Circuit of Georgia, that petitioners on January 23, 1961:

> . . . did assemble at Daffin Park for the purpose of disturbing the public peace and refused to disburse (sic) on being commanded to do so by Sheriff, Constable and Peace Officer, to wit: W. H. Thompson and G. W. Hillis . . . (R. 8).

Petitioners were brought before the city court of Savannah, Georgia on May 18, 1961; they filed demurrers raising constitutional defenses which were overruled (R. 11-13); entered pleas of not guilty (R. 10); and were tried and found guilty by a jury (R. 10). The court sentenced five petitioners to fines of one hundred dollars or five months in jail (R. 10-11); the sixth petitioner, Nathaniel Wright, was sentenced to a fine of one hundred twenty-five dollars or six months in jail (R. 11).

The evidence for the State consisted of testimony by the two arresting officers, G. H. Thompson and G. W. Hillis, by another officer, Sgt. Dickerson, who arrived at the scene of the alleged crime after the arrest, and by Carl Hager, Superintendent of the Savannah Recreational Department, who was not present during the incident but testified concerning certain city park department policies. The defendants presented no evidence.

At about 2:00 p.m. on January 23, 1961, police officers Thompson and Hillis were on duty in an automobile in Daffin Park, a fifty acre recreational park in Savannah, Georgia (R. 39; 49). Officer Thompson stated:

> This matter first came to my attention when this white lady had this conversation with us, the lady who told us that colored people were playing in the Basket Ball Court down there at Daffin Park, and that is the reason I went there, because some colored people were playing in the park. I did not ask this white lady how old these people were. As soon as I found out these were colored people I immediately went there (R. 40-41).

When the officers arrived at the basketball court, according to Officer Hillis,

> . . . the defendants were playing basketball. They were not necessarily creating any disorder, they were just 'shooting at the goal', that's all they were doing, they wasn't disturbing anything (R. 50; see also R. 41).

Petitioners were well dressed in street clothes; "some of them had on dress shirts, some of them had on coats—not a dress coat, but a jacket" (R. 39). The two officers approached the defendants, and both asked the defendants to leave the basketball court. Officer Thompson testified:

> When I came up to these defendants I asked them to leave; I spoke to all of them as a group when I drove up there, and I asked them to leave twice, but they did not leave at that time. I gave them an opportunity to leave. One of the, I don't know which one it was, came up and asked me who gave me orders to come out there and by what authority I came out there, and I told him that I didn't need any orders to come out there . . . (R. 40).

Officer Hillis said:

> Officer Thompson told them that they would have to leave, he told them that at first, and they did have an opportunity to leave after he told them that. He asked them to leave, and then I asked them to leave after I saw they wasn't going to stop playing, and [fol. 61] when I asked them to leave one of them made a sarcastic remark, saying: "What did he say, I didn't hear him", he was trying to be sarcastic. When I told them to leave there was one of them who was writing with a pencil and looking at our badge numbers. They all had an opportunity to leave before I arrested them, plenty of time to have left, but I told them to leave, they wouldn't leave and I put them under arrest (R. 49-50).

Officer Thompson testified further on direct that "The purpose of asking them to leave was to keep down trouble, which looked like to me might start—there were five or six cars driving around the park at the time, white people" (R. 40).

On cross examination Officer Thompson said:

> *I arrested these people for playing basketball in Daffin Park. One reason was because they were negroes.* I observed the conduct of these people, when they were on the basketball court and they were doing nothing besides playing basketball, they were just normally playing basketball, and none of the children from the schools were there at that particular time[1] (R. 41). (Emphasis added.)

[1] The officer had testified that children from nearby schools play in the park "every afternoon when they get out of school . . . about 2:30 in the afternoon, and this was around 2:00 o'clock" (R. 40).

On cross examination Policeman Thompson stated that there was a driveway about 15 yards from the basketball court, and that five or six cars were riding around the driveway, but that "I wouldn't say that that was unusual traffic for that time of day" (R. 41).

Daffin Park, where these incidents took place, is a part of the system of playgrounds maintained by the Recreational Department of the City of Savannah under the direction of Superintendent Carl Hager, who testified that the city parks were located in various colored and white neighborhoods with fourteen parks in white areas and seven parks in Negro areas (R. 42-44), and that "It has been the custom to use the parks separately for the different races" (R. 45). With regard to the Daffin Park area, Mr. Hager said, "around that area is mostly white" (R. 43).[2]

Neither of the arresting officers testified that petitioners violated any park rules. Officer Thompson said that he had never arrested people in Daffin Park for playing basketball there, and that, "I don't have any knowledge myself if any certain age group is limited to any particular basketball court, I don't know the rules of the City Recreational Department" (R. 41).

Superintendent Hager, whose office is located in Daffin Park, was informed of the arrests after they had been made and the police and defendants had left (R. 43). He was

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[2] Mr. Hager did state that occasionally colored children had played in the Daffin Park area and that no action had been taken (R. 43). Officer Thompson said:

> I have observed colored children playing in Daffin Park, but not playing basketball, but I have observed them playing and fishing, we had gotten previous calls that they were fishing in there and such, but not playing basketball (R. 42).

He said that he had not arrested those children but that he arrested these people, the petitioners, "because we were afraid of what was going to happen" (R. 42).

not a witness to the incident. He did testify about certain park rules and policies, stating that, " . . . we have no objection to older people using the facilities if there are no younger people present or if they are not scheduled to be used by the younger people" (R. 44), and that, "Grownups could use [the basketball courts] if there was no other need for them" (R. 45). Officer Thompson had testified that at the time of the arrest "none of the children from the schools were there at that particular time" and that "it would have been at least 30 minutes before any children would have been in this particular area" (R. 41). Although the arresting officers made several comments about the fact that petitioners were wearing street clothes, asserting that they were dressed up and had on "nice clothes" (R. 39; 42; 48), Mr. Hager said that the Recreational Department "would probably not expect" the usual basketball attire—short trunks, etc.—if persons "were playing in an unregulated and unsupervised program, and it would be consistent with our program to allow persons to wear ordinary clothing on the courts if they chose to do so, I don't think that we would object to that" (R. 45). And, indeed, Officer Thompson acknowledged that:

> The people who play basketball don't usually have uniforms on, sometimes they do and sometimes they don't.[3] It is possible to play basketball in street clothes (R. 42).

At the close of the evidence defense counsel made an oral motion for acquittal, arguing that there was no evidence that defendants went to the park for the purpose of disturbing the peace in violation of §26-5301; the court over-

[3] A portion of this sentence was omitted by the printer in preparing the record for this Court. See original record on file in this Court, pages 53-54.

ruled the motion (R. 14-16). The charge to the jury was general; it did not include any discussion of the elements of the defense except for a reading of the statute to the jury and a statement that city police officers were "peace officers" within the meaning of §26-5301 (R. 61-64). After the verdict and sentences (R. 10-11) petitioners filed identical motions for new trial, which were overruled by the court on July 24, 1961 (R. 17-38). The cases were consolidated for appeal (R. 51).

The Supreme Court of Georgia reviewed the convictions and affirmed, rejecting petitioners' arguments (R. 58). The opinion of the Court dealt with petitioners' constitutional claims in the following manner:

1) The Court refused to consider any of the grounds urged in the motion for new trial, asserting that the exception to the order overruling the motion for new trial was abandoned by petitioners' brief in the Supreme Court of Georgia (R. 54). The Court asserted that the brief contained "no argument, citation of authority, or statement that such grounds were still relied upon," but "merely referred to the third ground by asking: 'Did the Court commit error in overruling plaintiff's in error motion for new trial?'" (R. 54).

The motions for new trial (R. 17-38) had objected that the verdict was "contrary to the evidence and without evidence to support it" (¶1), "decidedly and strongly against the weight of the evidence" (¶2), and was "contrary to law and the principles of justice and equity" (¶3). The motion had claimed a denial to the defendants of due process of law under the "First and Fourteenth Amendments" to the Constitution of the United States in that "the statute . . . is so vague that the defendants were not put on notice as to what criminal act they had allegedly

committed" (¶4); a denial of due process under the Fourteenth Amendment in that "said statute is unconscionably vague . . . nowhere in said statute does there appear a definition of disturbing the peace or committing any unlawful act" (¶5); and a denial of due process under the Fourteenth Amendment in that the law gave the "peace officers untrammelled and arbitrary authority to predetermine the commission of the intent to commit an offense under said statute", and in that the determination of forbidden acts was "left solely to the discretion of the said Peace Officer" (¶6).

The Supreme Court of Georgia ruled on the five contentions in the demurrers. It held that paragraphs 3 and 4 of the demurrer (R. 12), which objected that petitioners were arrested to enforce racial discrimination and a custom of racial segregation in municipally owned places of public recreation in violation of the equal protection and due process clauses of the Fourteenth Amendment, on the ground that these were improper speaking demurrers (R. 55). The Court rejected the claims of paragraphs 1, 2, and 5 of the demurrer (R. 11-13), that the statute was unconstitutionally vague, denying petitioners' rights under the due process clause of the Fourteenth Amendment, holding that the language of the statute was "in terms so lucid and unambiguous that a person of common intelligence would discern its meaning and apprehend with what violation he was charged" (R. 57), and that the law had "a clear-cut standard to apprise one of what constitutes a criminal act and thus to guide the conduct of such officer" (R. 57).

ARGUMENT

I.

The Petitioners Were Denied Due Process in That They Were Convicted Under a Statute Too Vague and Indefinite to Provide an Ascertainable Standard of Guilt, and Which Provided No Fair Warning That Petitioners' Conduct Was Proscribed. The Only Rational Alternative Conclusion Would Be That Petitioners Were Convicted Without Any Evidence of Their Guilt.

The statute under which petitioners were convicted in this case, Section 26-5301, Code of Georgia, was held by the Supreme Court of Georgia to be "so lucid and unambiguous that a person of common intelligence would discern its meaning and apprehend with what violation he was charged" (R. 57). The court below discussed petitioners' argument that the law was vague only by referring to the common law origins of the phrase "disturbing the public peace," by asserting that this phrase was a synonym of "breach of the peace," and that this idea "has long been inherently encompassed in our law and is prevalent in the various jurisdictions" (R. 56). The court also said that the crime of unlawful assembly has common law origins (R. 56), but offered no definition of the crime as embodied in this statute; nor did the court say the statute was the equivalent of common law unlawful assembly. The opinion contained no discussion of the evidence in this case.[4] The court did say that it had no occasion to consider the alleged vagueness of the statutory phrase "or committing any unlawful act", because the accusation charged petitioners only

[4] The trial court charge to the jury did not discuss the evidence or the meaning of the statute, except to state that city policemen were "peace officers" within the meaning of the law.

under the phrase concerning "disturbing the public peace" (R. 55).

The Georgia Supreme Court did not refer to any prior opinions construing Section 26-5301. Prior to this decision, the statute had been mentioned only two times in published opinions.[5] *Kent* v. *Southern R. Co.*, 52 Ga. App. 731, 184 S. E. 638 (1935),[6] and *Samuels* v. *State*, 103 Ga. App. 66, 118 S. E. 2d 231 (1961).[7] Of these two cases, only the *Samuels* case, *supra*, involved a prosecution under Section 26-5301.

In *Samuels* v. *State*, *supra*, three Negroes were held to violate Section 26-5301 in a prosecution arising from a completely peaceful "sit-in" at a drugstore lunch counter where the police, but not the owner, ordered them to leave. The appellate court supplied an element to convict by judicially noticing that hostility to lunch counter desegregation might lead white persons to attack defendants, and that the defendants should have known this. The facts in the *Samuels* case, set out more fully in the note below, bear

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[5] A similar provision appeared in the Ga. Penal Code of 1816 (Ga. L. 1816, p. 178), Lamar's Compilation of the Laws of Georgia (1821), p. 592; and see Ga. Penal Code of 1833, §359, Cobb's Digest of the Statute Laws of Georgia (1851), p. 810. No reported cases have been discovered which discuss either of these predecessors of §26-5301.

[6] *Kent* v. *Southern R. Co.*, *supra*, was a damage suit brought by a picketing mill worker against a railroad for injury sustained from a tear-gas gun discharged by a police chief at the request of a railroad conductor to disperse a group of 50 strikers, including plaintiff, who were blocking a train from entering a mill by standing on the tracks. In holding the complaint demurrable, the court said that plaintiff and those with him blocking the train violated §26-5301 and other penal laws.

[7] A companion case, *Martin* v. *State*, 103 Ga. App. 69, 118 S. E. 2d 233, affirmed convictions said to be on facts similar to *Samuels*, *supra*, on authority of that case, without discussion of the facts or §26-5301.

a striking similarity to *Garner* v. *Louisiana*, 368 U. S. 157; the same is true of the judicial notice theory argued but rejected in *Garner, supra.*[8]

Petitioners submit that §26-5301 is by no means clear and unambiguous, either in its terms or in light of the construction placed upon it by the state courts. The antiquity of the law does nothing to add clarity to it, particularly since it has so rarely been mentioned in the case law.[9]

If the *Samuels* case construction of the law is accepted, the statute certainly affords no ascertainable standard of

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[8] In *Samuels* v. *State, supra*, it was undisputed that defendants were quiet, peaceable and orderly and that they merely courteously requested service at a lunch counter customarily reserved for whites; that they were refused service because they were colored; that they were not asked to leave by any store employee; that a police officer was called and defendants were arrested for not obeying his order to leave (118 S. E. 2d at 232-233). There was no evidence of any threats or actual violence or disorder, but a number of white persons gathered as onlookers, and several witnesses opined "that the presence of the defendants would tend to create a disturbance" (*Ibid.*). The Georgia Court of Appeals construed §26-5301 to cover such orderly conduct that was not in and of itself a disturbance of the peace. To support this the court quoted at length from Corpus Juris for a definition of "breach of the peace" and cited two Georgia decisions holding that cursing and abusive language tending to incite to immediate violence is a breach of the peace. See, e.g., *Faulkner* v. *State*, 166 Ga. 645, 144 S. E. 193 (1928), and *Elmore* v. *State*, 15 Ga. App. 461, 83 S. E. 799 (1914). To sustain the conviction, the court held that the trial court "undoubtedly" judicially noticed the fact that lunch counter segregation was a custom throughout the southeast part of the United States; that "the vast majority of the white people in these areas" have such strong feelings in favor of continuance of these customs that "attempts to break down the custom have more frequently than not been met with violent and forceable resistance on the part of the white people" (168 S. E. 2d at 233). The court then concluded that defendants were bound to know that their acts "might" result in violent opposition by local white people, and on this basis held the arrests and convictions justified. (*Ibid.*)

[9] Laws similar to the statute in *Winters* v. *New York*, 333 U. S. 507, 511, were said to have "lain dormant for decades."

guilt. There is no real standard for determining the existence of a "*purpose* to disturb the public peace." This determination is left entirely in the discretion of the police, the courts, and the jury. When the law is construed to apply to peaceful and orderly conduct which may incite others to violence, without any required showing of threats or other overt manifestations of impending disorder or violence, the question left for the court or jury is: Whether under existing conditions, including the attitudes of a community majority with respect to particular peaceful and lawful conduct, as appraised by the court or jury from general knowledge not limited to the evidence, the defendant should have believed that his conduct might result in violent opposition? This is plainly not a mere requirement that a defendant make a forecast based on a rule of reason. Rather, it is a requirement that he forecast a jury's determination which in itself must be based on "pure speculation" as to the future conduct of others. *Herndon* v. *Lowry*, 301 U. S. 242, 263. If the public attitudes that this determination involves were a fixed and static thing, the decision would be perilous enough—even for a scientific opinion analyst or pollster. But public attitudes are not static. The subject of race relations, for one example, readily brings to mind cases of peaceful acceptance of desegregation in places where there has been expected violent opposition. Indeed, lunch counters in Savannah have been desegregated notwithstanding the views expressed in the *Samuels* case, *supra* (New York Times, July 9, 1961, p. 65, col. 1). Cf. footnote 8, *supra*.

To make the peaceful exercise of a constitutional right subject to a preliminary guess of this nature, under penalty of fine or imprisonment, is so to deter the exercise of the right as to practically destroy it. See *Herndon* v. *Lowry*, 301 U. S. 242, 261-264. Just as the "current rate of per diem

wages in the locality" was held inherently incapable of fixation in *Connally* v. *General Construction Co.*, 269 U. S. 385, 393-395, so in this case the required judicial appraisal of the attitudes of an amorphous vast community majority, as viewed from the defendants' point of view, provides no ascertainable standard for the court or jury.

If the statute is considered without the benefit of the construction given it in the *Samuels* case, *supra*, it could not be known whether the law covered peaceful and orderly acts or merely outwardly disorderly conduct; whether an actual or an imminent or merely a foreseeable disturbance was required; whether violence was essential and, if so, whether it must be actual or merely threatened; whether the defendants' "purpose" must be manifested by some overt act or whether it may be supplied by a jury determination, discretionary or otherwise.

It is evident that this law is not "narrowly drawn to define and punish specific conduct," *Cantwell* v. *Connecticut*, 310 U. S. 296, 311. Here, as in *Cantwell* (310 U. S. at 308), the vice of the law consists in its "sweeping in a great variety of conduct under a general and indefinite characterization and leaving to the executive and judicial branches too wide a discretion in its application."

The opinion below cites *Faulkner* v. *State*, 166 Ga. 645, 665, 144 S. E. 193 (1928), a case holding that abusive and profane language was a breach of the peace. This Court has upheld a prohibition aimed at such direct incitements to violence in a law "narrowly drawn to define and punish specific conduct." *Chaplinski* v. *New Hampshire*, 315 U. S. 568, 573. Insulting or fighting words were said to receive no protection as free speech because they are "no essential part of any exposition of ideas and are of such slight social value . . . " (315 U. S. at 572). But no comparable char-

acterization can be given to petitioners' conduct, whether it be regarded as merely playing a basketball game, or as a profound non-verbal expression of the impropriety of racial segregation in public parks.

As stated by Mr. Justice Harlan, concurring in *Garner* v. *Louisiana,* 368 U. S. 157, 202:

> But when a State seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression as assured by the Fourteenth Amendment, it cannot do so by means of a general and all-inclusive breach of the peace prohibition. It must bring the activity sought to be proscribed within the ambit of a statute or clause "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." Cantwell v. Connecticut, supra (310 U. S. at 311); Thornhill v. Alabama, 310 U. S. 88, 105.

As this court held in *Thornhill* v. *Alabama,* 310 U. S. 88, 97, "a penal statute . . . which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press" brings to bear a threat similar to that involved in discretionary licensing of free expression. That opinion said:

> The existence of such a statute, which readily lends itself to harsh and discretionary enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. 310 U. S. at 97-98.

Similarly here, the existence of an indefinite unlawful assembly law operates to deter and restrain any attempt by Negro citizens to exercise constitutional rights to nonsegregated use of public facilities. The Fourteenth Amendment was primarily designed to protect the civil rights of Negroes. *Strauder* v. *West Virginia*, 100 U. S. 303, 307. Such rights cannot properly be regarded as any less preferred than the First Amendment type protections incorporated into the Fourteenth Amendment by the due process clause. The right to nonsegregated use of facilities the government provides is so fundamental as to be protected both as "liberty" under the due process clause and by the equal protection clause of the Amendment. *Cooper* v. *Aaron*, 358 U. S. 1, 19; cf. *Bolling* v. *Sharpe*, 347 U. S. 497.

Hague v. *C. I. O.*, 307 U. S. 496, also supports the proposition that §26-5301 is unconstitutionally general and indefinite. In *Hague, supra*, the right of free assembly was limited by a requirement that a permit be obtained from an official who could refuse a permit only "for the purpose of preventing riots, disturbances, or disorderly assemblage" (307 U. S. at 502, n. 1). The court held the law invalid on its face because, "it can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression. . . . But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right" (307 U. S. at 517). And, of course, one accused under a general and sweeping law has no obligation to demonstrate that the state could not have written a different and more precise law constitutionally proscribing his conduct. *Thornhill* v. *Alabama, supra*, at 198. Furthermore:

> [I]t is the statute and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.

> Stromberg v. California, 238 U. S. 359, 368; Schneider v. State, 308 U. S. 147, 155, 162, 163. Compare Lanzetta v. New Jersey, 306 U. S. 451. (*Ibid.*)

Turning to the facts of the present case, it is equally apparent that §26-5301 gave no fair warning of the offense punished, and that it would confer unrestrained discretion of the exercise of constitutional freedoms.

First, there was no claim that petitioners' conduct was, in itself, disorderly or offensive. The police officer testified to the contrary that "they were not necessarily creating any disorder, they were just 'shooting at the goal,' that is all they were doing. They wasn't disturbing anything" (R. 50). There was no admission by the defendants of a *purpose* to disturb the public peace, and there was nothing in their conduct which might justify a determination that they had such a purpose. This is true because there was neither an actual disturbance of the peace, nor any evidence that their conduct made such a disturbance imminent or even foreseeable because of its tendency to provoke a disorderly response from others. The only thing in the record touching upon the possibility that defendants' conduct might have led to a breach of the peace was testimony by officer Thompson that:

> The purpose of asking them to leave was to keep down trouble, which looked like to me might start—there were five or six cars driving around the park at the time, white people (sic) (R. 40).

There was an unexplained statement that " . . . I arrested these people because we were afraid of what was going to happen" (R. 42). But the record contains no support for the policeman's fears. There was no evidence that anyone in the passing automobiles even observed petitioners, and

certainly no evidence that these passersby did or said anything to indicate that they were disturbed in any way or were provoked or angered by petitioners' conduct. There was no evidence that any of the automobiles stopped or approached petitioners, or that traffic was impeded. There is a positive statement by the officer that this automobile traffic was not unusual for that time of day (R. 41).

The only other person whom the record shows to have observed petitioners' conduct was the unidentified white lady who reported to the officers merely that colored people were playing basketball in the park. There was no testimony by the officers that she manifested any disturbance, anger, or anxiety and certainly no indication that she was provoked to the point of creating disorder. No other persons were present.[10] School children in the nearby schools were not expected in the area for "at least thirty minutes" by the officers (R. 41).[11]

There is no evidence that petitioners violated any park rules,[12] but, in any event, it appears that the arresting

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[10] The plain words of the statute require something in addition to disobedience of the officer's orders. If this were all that was required, the statute would nevertheless be offensively indefinite. *Garner* v. *Louisiana*, 368 U. S. 157, 204, footnote 11 (Mr. Justice Harlan concurring).

[11] The officers did not connect their order to leave with the anticipated presence of school children, nor was their order that petitioners leave timed to coincide with the arrival of the children. There was no park rule or policy prohibiting adults from using the park facilities when they were not being used by the children (R. 46); nor were any hours posted for use of the basketball courts (R. 44).

[12] The State has argued in its "Brief in Opposition to Certiorari" in this Court that petitioners were arrested because they were "grown men" on a "children's playground" and were dressed in street clothes. (See Brief in Opposition, p. 10, second paragraph.) But the superintendent of the recreation department testified that the basketball courts could be used by adults (R. 44) (and, there-

officer did not know the park rules and thus could not have predicated his command that petitioners leave or the arrest upon any park rule violation.[13]

The arresting officer expressly acknowledged that race was a factor in the arrests. Officer Thompson stated that:

> I arrested these people for playing basketball in Daffin Park. *One reason was because they were negroes* (R. 41). (Emphasis added.)

This testimony, of course, must be understood as it relates to the evidence that Daffin Park was one which was customarily used by white persons, with the occasional exception of Negro children fishing and playing—but not on the basketball court (R. 42), as a part of a more general local custom "to use the parks separately for the dif-

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fore, petitioners were not on a playground exclusively for children), and also that it was not improper to wear street clothes in unsupervised play on the basketball courts. The witness stated that "if there was a conflict betwen younger people and the older people using the park facilities, the preference would be for the younger people to use them, but we have no objections to older people using the facilities if there are no younger people present or if they are not scheduled to be used by the younger people" (R. 44). The witness said that he would not know whether any program was scheduled for the time petitioners were there without referring to his records (R. 47).

[13] See Note, 109 U. of Pa. L. Rev. 67, 81:

"It is scarcely consonant with ordered liberty that the amenability of an individual to punishment should be judged solely upon the sum total of badness or detriment to the legitimate interests of the state which can be found, or inferred, from a backward looking appraisal of his trial record."

And see *Id.* at footnote 74:

"A state could probably justify punishing most conduct which it desired to punish on the basis of the after-the-fact record, by isolating from the precisely detailed circumstances of the particular defendant's acts a sufficient quantum of substantive evil of legitimate legislative concern to dress up a tolerable constitutional crime."

ferent races" (R. 45). The officer's actions tend to confirm his statement that race was a reason for the arrests since he acknowledged that he proceeded directly to the basketball court to investigate upon merely being told that "colored people were playing in the Basketball Court", and —insofar as the record reveals—nothing more (R. 41). The officer did not ask the unidentified white lady who gave him this information how old the people playing basketball were. As he put it, "as soon as I found out these were colored people I immediately went there" (R. 41).

The race of the petitioners cannot validly be made a basis for the determination of their guilt. The mere presence of Negroes in a facility which they customarily do not use, cannot be regarded as criminal conduct or as evincing a purpose to violate the law. *Taylor* v. *Louisiana*, 370 U. S. 154. It is settled that this municipally operated park was an area which petitioners had a right to use, regardless of any segregation rule or custom, *Holmes* v. *City of Atlanta*, 350 U. S. 879; *Mayor and City Council of Baltimore* v. *Dawson*, 350 U. S. 877; *New Orleans City Park Improvement Asso.* v. *Detiege*, 358 U. S. 54; just as this was clear in *Taylor* v. *Louisiana*, *supra*, with respect to interstate transportation facilities. Cf. *Gayle* v. *Browder*, 352 U. S. 903; *Boynton* v. *Virginia*, 364 U. S. 454, 459, 460.

There was no evidence tending to show that petitioners' action in conflict with the racial custom of park segregation, would, in the locality involved, be likely to arouse passions or inflame those opposed to desegregation of publicly owned facilities. There is no such evidence relating either to the particular circumstances of this case or to any general community condition. Here there is not even evidence of "restless onlookers" which was held insufficient to support such a claim in *Taylor* v. *Louisiana*, 370 U. S. 154, 155.

The fact that Negro children had used this very park without the necessity for any official intervention (though their presence was noted by the police and park officials), further undermines any such speculation based on judicial notice of local attitudes[14]—even if such opposition could be substituted for evidence at the trial, as it clearly cannot be under the holding in *Garner* v. *Louisiana*, 368 U. S. 157, 173, 175-176.

Even beyond this lack of evidence to provide a basis for a permissible inference that petitioners' conduct engendered such extreme racial hostility as to incite unlawful, violent opposition, it is clear that this is not enough to justify using the state's police power to preserve segregation customs. *Taylor* v. *Louisiana*, 370 U. S. 154, 156, footnote 2; *Buchanan* v. *Warley*, 245 U. S. 60, 80, 81; *Cooper* v. *Aaron*, 358 U. S. 1. "For the police are supposed to be on the side of the Constitution, not on the side of discrimination." *Garner, supra*, at 177 (Justice Douglas concurring).

The only rational alternative explanation for the conviction, to the claim that the statute did not fairly warn against petitioners' conduct, is that there was indeed no evidence at all to support these convictions, thus requiring reversal under the doctrine of *Thompson* v. *City of Louisville*, 362 U. S. 199. The mere presence of Negroes on a customarily all-white city owned basketball court "is not, because it could not be" unlawful assembly. *Thompson* v.

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[14] There is, of course, no necessary consistency, even in a given locality in the South, between the vehemence of the attitudes of the white majority toward nonsegregated lunch counter service—as in *Garner, supra*—and the same group's attitude towards an all-Negro group, as here (or for that matter, even an integrated group) playing basketball in a city-owned facility customarily used by whites.

Louisville, 362 U. S. 199, 206, citing *Lanzetta* v. *New Jersey*, 306 U. S. 451. Certainly this statute does not give clear warning that the presence of a Negro on a customarily white basketball court is punishable. It is certainly not difficult to draft a segregation law specifically making it unlawful for a Negro to use a "white" park. Cf. *Holmes* v. *City of Atlanta*, 124 F. Supp. 290, 291-292 (N. D. Ga. 1954); aff'd 223 F. 2d 93 (5th Cir. 1955); vacated 350 U. S. 879. But the well-known invalidity of such open segregation laws has frequently led to the use of Aesopian language to accomplish the same purpose,[15] or the use of catch-all laws to the same end. *Garner* v. *Louisiana*, 368 U. S. 157.[16]

Petitioners' activity, if not a "demonstration" in the sense that a sit-in has become a well recognized form of protest (and there is nothing in the record to indicate whether petitioners went to Daffin Park as demonstrators to test segregation or merely to play basketball), was nevertheless sufficiently non-conformist to be regarded as evidencing petitioners' conviction that racial exclusion from a publicly owned park is improper. Such conduct within the area of protected liberty under the Fourteenth Amendment, may not constitutionally be reached by a vague and indefinite law which does not evince any legislative judgment that it represents so clear and present a danger that it should be criminally proscribed. *Cantwell* v. *Connecticut*, *supra*; *Garner* v. *Louisiana*, 368 U. S. 157, 196-207 (Mr. Justice Harlan concurring).

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[15] Compare the ordinance in *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 532 (5th Cir. 1960), which replaced an overt segregation requirement with a mandate of obedience to bus drivers' orders.

[16] The Swedish writer, Gunner Myrdal, noticed this in his book published 18 years ago saying that "... policemen in the South consider the racial etiquette as an extension of the law, and the courts recognize 'disturbance of the peace' as having almost unlimited scope," Myrdal, *An American Dilemma*, 618 (1944).

Finally, the State's suggested construction of §26-5301 renders it even more indefinite. The "Brief in Opposition to Certiorari," p. 12, suggests that the law does not require criminal intent at all, saying:[17]

> Thus it is not necessary to show whether the petitioners actually intended to create a breach of the peace to convict them.

What does "purpose" refer to if it does not refer to "actual intent"? If this construction of the law is correct, and no real criminal intent is required under §26-5301 to convict a person for an act admittedly not blameworthy *per se*, Georgia has denied due process. This would be an "indiscriminate classification of innocent with knowing activity [which] must fall as an assertion of arbitrary power" and which "offends due process." *Wieman* v. *Updegraff*, 344 U. S. 183, 191.

II.

The Judgment Below Does Not Rest Upon Adequate Non-Federal Grounds for Decision.

Initially it should be emphasized that the court below indisputably *did* consider and reject petitioners' due process claim under the Fourteenth Amendment. The State has never argued to the contrary either in its brief in opposition

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[17] In connection with this the "Brief in Opposition," p. 12, perhaps harmlessly misquotes *Cantwell* v. *Connecticut*, 310 U. S. 296, 309. Not so harmlessly it ignores the impact of the following sentence pointing out that practically all such decisions holding acts likely to provoke disorder to be a breach of the peace "even though no such eventuality [disorder] be intended", involved "profane, indecent or abusive remarks directed to the person of the hearer."

to certiorari or in the court below.[18] The court below concluded its discussion of the due process vagueness issue (R. 55-58) by asserting: "However, by applying the well-recognized principles and applicable tests above-stated, we find no deprivation of the defendants' constitutional rights under the Fourteenth Amendment of the United States Constitution" (R. 57-58).

The only potential area of dispute concerns whether this Court may consider the facts of petitioners' case in deciding the constitutional claim. This potential conflict does not arise because the court below ever said that it was prohibited from looking at the facts of the case. It did not so state; there is only an implication that this is so because the opinion was written as an abstract discussion of the extent to which §26-5301 was indefinite without reference to the facts of this case, or any other case; because the court below ruled that it would not appraise the facts relating to another and essentially different constitutional claim raised in the demurrer—the claim that the arrest was the product of discriminatory law enforcement designed to compel racial segregation in public parks; and because the court ruled that it would not consider petitioners' claim of error in the overruling of the motion for new trial.

The conflict over this limited issue is indeed only "potential" for the State has never argued either in the court below nor in this Court that no consideration may be given to the facts of the record in deciding the vagueness issue. To the contrary, indeed, the State has consistently argued that petitioners' acts were criminal under the law and that it gave them fair warning.[19]

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[18] Petitioners have deposited with the Clerk of this Court certified copies of all briefs filed in the Supreme Court of Georgia.

[19] See "Brief in Opposition to Certiorari," *passim;* see also, the State's "Brief of Defendant-in-Error" in the court below.

However, in the event that this matter is viewed by this Court as having any significance, petitioners present the following to demonstrate that in the circumstances of this case no significant limitation can be placed upon this Court's review because of any state procedural rule.

As has been said before, petitioners' due process vagueness claims were raised in both the demurrer (R. 11) and the motions for new trial (R. 17, et seq.). The vagueness objections were thus made both before and after the evidence against petitioners was adduced.

The Supreme Court of Georgia ruled that it would not consider the motion for new trial because it read petitioners' brief as abandoning the objection to the overruling of the motion for new trial. The opinion below acknowledged (R. 54) that defendants' brief did contain as one of three "Issues of Law" the following: "Did the court commit error in overruling plaintiff's-in-error motion for new trial?" [20] But the court went on to find an abandonment of this claim asserting that "there was no argument, citation or authority, or statement that such grounds were still relied upon", and that the point must be treated as abandoned under the applicable rule laid down in *Henderson* v. *Lott*, 163 Ga. 326, 136 S. E. 403.[21]

The court below thus found an implied waiver of a federal constitutional right. There was no assertion that petitioners made any expressed abandonment of the claim

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[20] "Brief of Plaintiff-in-Error", in court below, p. 6.

[21] The opinion below makes no reference to Section 6-1308, Ga. Code Ann., providing:

> "6-1308. *Questions to be considered.*—All questions raised in the motion for new trial shall be considered by the appellate court except where questions so raised are expressly or impliedly abandoned by counsel either in the brief or upon oral argument. A general insistence upon all the grounds of the motion shall be held to be sufficient. (Acts 1921, pp. 232, 233.)"

either in the brief or in oral argument. However, a fair reading of petitioners' brief filed in the court below does not support even the theory of implied abandonment. Petitioners' brief in the court below contained a portion labelled "Argument and Citation of Cases" which was not subdivided,[22] and which did argue that the law was vague making particular references to the facts in this record,[23] and did refer to appropriate decisions of this Court.[24]

The Georgia Court of Appeals has held that the mere citation of *one* applicable decision of that court was suffi-

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[22] Nothing in the rules of the Supreme Court of Georgia requires any subdivision of argument among the assigned errors. Rule 14 of the Georgia Supreme Court (printed in Section 24-4515, Ga. Code Ann.) states:

> *"Contents of brief of plaintiff in error."*—The brief of the plaintiff in error shall consist of two parts:
>
> (1) Part one shall contain a succinct but accurate statement of such pleadings, facts, assignments of error, and such other parts of the bill of exceptions or the record as are essential to a consideration of the errors complained of.
>
> (2) Part one shall also contain succinct and accurate statements of the issues of law as made by the errors assigned, and reference to the parts of the record or bill of exceptions necessary for consideration thereof.
>
> (3) Part two shall contain the argument and citation of authorities.

[23] See "Brief of Plaintiffs in Error," pp. 7-10. One example of such argument appears at p. 8:

> "Plaintiffs-in-Error could not possibly have predetermined from the wording of the statute that it would have punished as a misdemeanor an assembly for the purpose of playing basketball. It follows as a matter of course that if the act committed was not punishable, then the peace officer would not have the authority to command their dispersal. To be arrested and convicted pursuant to said statute denies to the Plaintiffs-in-Error due process of law as secured to them by the Fourteenth Amendment to the United States Constitution."

[24] Decisions of this Court on vagueness issues cited in the "Brief of Plaintiffs in Error" were *United States* v. *Brewer*, 139 U. S. 278; *Connally* v. *General Construction Co.*, 269 U. S. 385, 393; *Winters* v. *New York*, 333 U. S. 507.

cient argument of an assignment of error to prevent its being treated as abandoned, even absent a clear statement that the point was relied upon. *Roberts v. Baker*, 57 Ga. App. 733, 735, 196 S. E. 104. But here there is even more, for the argument begins with a statement that the "*principal* question" was raised by the overruling of the demurrer (Brief of Plaintiffs in Error, p. 7), thus, plainly implying that this was not the *only* question, but merely the chief, foremost, or highest in importance.[25]

It is submitted that the basis for this holding of abandonment or waiver of an aspect of a fundamental constitutional defense which is otherwise conceded to have been preserved, is so tenuous and unsupported as to compel the view that the court below did not exercise due regard for the general doctrine that every reasonable presumption is to be indulged against the waiver of a constitutional right. Cf. *Glasser* v. *United States*, 315 U. S. 60, 70.

Even beyond all this, if it be assumed *arguendo* that the procedural rules applied below must limit this Court's consideration of the petitioners' due process vagueness claim to any extent, it by no means necessarily follows that this Court is compelled to consider the law in a completely sterile and abstract fashion, blinding itself to the uses to which this law in all its generalities can be put, and has been put in the only other reported application of it. See e.g., *Samuels* v. *State*, 103 Ga. App. 66, 118 S. E. 2d 231 (1961); *Martin* v. *State*, 103 Ga. App. 69, 118 S. E. 2d 233 (1961). And since even though the Court below may not have discussed the evidence, it did have the full record before it, this Court should not ignore the fact that the very "judgment of conviction" represents in a real sense

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[25] See definition of "principal", adjective, in Webster's *New International Dictionary*, p. 1966 (2d ed.), and Black's *Law Dictionary*, p. 1355 (4th ed. 1951).

"a controlling construction of the statute", *Bailey* v. *Alabama,* 219 U. S. 219, 235; *Taylor* v. *Georgia,* 315 U. S. 25, 30.

The appellees argue in the "Brief in Opposition to Certiorari" that this Court may pass upon federal issues where the state court has refused to entertain them only if the State has applied a procedural rule inconsistently. But this Court has found such refusals unreasonable for reasons other than inconsistent application. *Staub* v. *Baxley,* 355 U. S. 313; *Terre Haute I. R. Co.* v. *Indiana,* 194 U. S. 579, 589; *Union P. R. Co.* v. *Public Service Commission,* 248 U. S. 67. Indeed, this Court has rejected attempts to limit the scope of its review on the theory that denials of due process must be ignored when, although they appear clearly from the proceedings, objections made were not renewed after the denial of due process became manifest. See *Blackburn* v. *Alabama,* 361 U. S. 199, 209-210; *Brown* v. *Mississippi,* 297 U. S. 278, 286-287.

Any state avoidance of federal constitutional issues raised by a defendant in a criminal proceeding must meet minimum standards of intrinsic fairness. It is submitted that the action of the court below in limiting consideration of the due process vagueness issue fails to meet such standards, and is as much a denial of due process as an erroneous decision on the merits. *Lawrence* v. *State Tax Comm.,* 286 U. S. 276, 282.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 68.

NATHANIEL WRIGHT, et al.,
Petitioners,
vs.
GEORGIA.

On Writ of Certiorari to the Supreme Court of the State of Georgia.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 68.

NATHANIEL WRIGHT, et al.,
Petitioners,

vs.

GEORGIA.

On Writ of Certiorari to the Supreme Court
of the State of Georgia.

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED.

I.

Whether the conviction of petitioners for unlawful assembly denied them due process of law under the Fourteenth Amendment, when they were convicted on evidence which showed that they were grown Negro men who took over a playground in a predominantly white neighborhood at a time when the playground was reserved for and was to be used by school children and they refused to leave when requested by the police.

II.

Whether the decision below asserts any adequate nonfederal grounds for limiting consideration of an aspect of an important constitutional right where the court below determined that such right had been abandoned.

STATEMENT.

Petitioners were convicted of violating Section 26-5301, Georgia Code Annotated in that they did assemble in the County of Chatham on January 23, 1961 at Daffin Park for the purpose of disturbing the public peace and refusing to disburse (sic) on being commanded to do so by Sheriff, Constable and Peace Officer, to wit: W. H. Thompson and G. W. Hillis . . . (R. 8).

The State of Georgia introduced four witnesses, the first witness, Officer G. H. Thompson stated:

> When we arrived at this Basket Ball Court we found around seven colored boys playing basket ball there . . . (R. 39).
>
> They were pretty well dressed at that time; some of them had on dress shirts, some of them had on coats—not a dress coat, but a jacket. I didn't notice what particular type shoes they had on, as far as I know they didn't have "Tennis shoes" on. I am familiar with the type of shoes that people wear when they play basket ball, they didn't have that type of shoes on as well as I remember . . . (R. 39).
>
> I think that these defendants ranged in age from 23 to 32 . . . (R. 39).
>
> There is a school nearby this Basket Ball Court, it is located at Washington Avenue and Bee Road, I mean, at Washington Avenue and Waters. There is another school on 44th Street—there are two schools nearby; I believe that they are both "grammar" schools. I patrol that area and the children from these schools play there, they come there every day I believe, I believe they come there every afternoon when they get out of school, and I believe they come there during recess. The school, I believe, gets out about 2:30 in the afternoon, and this was around 2:00 o'clock . . . (R. 40).

> When I came up to these defendants I asked them to leave; I spoke to all of them as a group when I drove up there, and I asked them to leave twice, but they did not leave at that time. I gave them an opportunity to leave. One of them, I don't know which one it was, came up and asked me who gave me orders to come out there and by what authority I came out there, and I told him that I didn't need any orders to come out there. The children from the schools, would have been out there shortly after that. The purpose of asking them to leave was to keep down trouble, which looked like to me might start—there were five or six cars driving around the park at the time, white people. They left only after they were put under arrest, they were put under arrest approximately 5 to 10 minutes after I told them to leave. It seemed like to me that they were welcoming the arrests, because all of them piled into the car, Officer Hillis's car, at the time, and he had to stop them . . . (R. 40).

On cross-examination Officer Thompson further testified:

> Under ordinary circumstances I would not arrest boys for playing basketball in a public park. I have never made previous arrests in Daffin Park because people played basketball there . . . (R. 41).

On redirect he stated:

> There have been colored children in Daffin Park, but I did not arrest those children, but I arrested these people because we were afraid of what was going to happen. Colored children have played in Daffin Park, and they have fished there . . . (R. 42).

The next witness the State put up was Carl Hager, Superintendent of the Recreational Department of the City of Savannah. He stated:

As Superintendent I am over all of the playgrounds in the City of Savannah, Chatham County, Georgia: that includes Daffin Park and all the other parks that have playgrounds. These playgrounds are mostly in neighborhood areas. There are neighborhood areas where colored families live, and neighborhood areas where white people live, we try to establish them in that manner, and, then there are certain areas where they are mixed to a certain extent. We have a playground in the Park Extension, and that is a mixed area for white and colored—a white section and a colored section—it is mostly white, but there are several colored sections within several blocks. The Daffin Park area, mostly around that area is mostly white. It has occurred, from time to time, that colored children would play in the Daffin Park area and in the Park Extension area, but no action had been taken, because it is legal, it is allowed, and nobody has said anything about it. The playground areas are basically for young children, say 15 to 16 and under, along that age group, we give priority to the playground to the younger children over the grown-ups, it made no difference as to whether they were white or colored. Anytime that we requested anyone to do something and they refused we would ask the police to stop in, if we would ask them to leave and they did not we would ask the police to step in. We have had reports that colored children have played in the Park Extension, but they were never arrested or told to leave . . . (R. 42-43).

On cross-examination, Mr. Hager stated in answer to questions:

I testified that if there was a conflict between the younger people and the older people using the park facilities the preference would be for the younger

people to use them, but we have no objection to older people using the facilities if there are no younger people present or if they are not scheduled to be used by the younger people . . . (R. 44).

It has been the custom to use the parks separately for the different races. I couldn't say whether or not a permit would or would not be issued to a person of color if that person came to the office the Recreational Department and requested a permit to play on the courts, but I am of the opinion that it would have been, we have never refused one, the request never has been made . . . (R. 45).

There is no minimum or maximum age limit for the use of basket ball courts, however, at the present time we have established a minimum a maximum age limit of 16 years for any playground area.

On redirect Mr. Hager further explained:

On school days these courts and the playground area at Daffin Park are available for only certain age groups and they are only used at that time of day by the schools in that vicinity, it is, more or less, left available for them, that is the way we have our recreation setup . . . (R. 46).

I would like to say that normally we would not schedule anything for that time of the day because of the schools using the total area there. The schools use the area during school hours. The Parochial School uses it during recess and lunch periods and also for sport, as also the Lutheran School, and the public schools bring their students out there by bus and at various times during school hours all day long, we never know when they are coming, and they use Cann Park the same way, I might add . . . (R. 47).

If it was compatible to our program we would grant a permit for the use of the basketball court in

Daffin Park to anyone regardless of race, creed or color, however, at that time of day it would not be compatible to our program . . . (R. 47-48).

Officer Hillis, the next witness for the State, stated as follows:

My name is G. W. Hillis. I am a police officer of the Savannah Police Department, and I was a member of and on duty with the Savannah Police Department on or about the 23rd day of January of this year; I was on duty then and I had on my police uniform. When I arrived there I saw the defendants, they were playing basketball. Officer Thompson talked to them first, and then I talked to them. I asked them to leave, Officer Thompson had already asked them, I heard him ask them. They did not leave, and they did not stop playing until I told them they were under arrest. We called the wagon (cruiser). Officer Thompson told them that they would have to leave, he told them that at first, and they did have an opportunity to leave after he told them that. He asked them to leave, and then I asked them to leave after I saw they wasn't going to stop playing, and when I asked them to leave one of them made a sarcastic remark, saying: "What did he say, I didn't hear him", he was trying to be sarcastic. When I told them to leave there was one of them who was writing with a pencil and looking at our badge numbers. They all had an opportunity to leave before I arrested them, plenty of time to have left, but I told them to leave, they wouldn't leave and I put them under arrest . . . (R. 49-50).

I am familiar with the fact that there are schools in that area, and that children would be out there in about 15 minutes to play in that area . . . (R. 50).

ARGUMENT I.

Petitioners Argue That the Statute Under Which They Were Convicted Was Too Vague and Indefinite to Provide an Ascertainable Standard of Guilt.

In their argument on this point, Petitioners seek to lead the court to believe that this statute is a statute that has rarely been used and they base this on the fact that there is a paucity of appellate decisions involving its construction. As pointed out in the opinion of the Georgia Supreme Court (R. page 52 at page 56) the crime of unlawful assembly is itself of common law origin.

To determine whether breach of the peace statutes are seldom used, I refer the court to the Uniform Crime Reports of 1961 printed by the United States Department of Justice which on page 30 carries Breach of the Peace as disorderly conduct in their records. On page 93 the chart shows that there were 468,071 arrests for disorderly conduct (Breach of the Peace) made in the United States during 1961. Other than the amount of people arrested for drunkenness this was by far the most common charge placed against individuals. As to whether such a charge was too vague and indefinite to warrant a conviction, page 86 of the report shows that there were 62.6% findings of guilty against all people arrested for disorderly conduct and 15.4% acquittals or dismissals. What is most probably true is that due to the antiquity of the crime "Breach of the Peace", it has rarely been challenged in the Appellate Courts.

In their brief petitioners refer to the case of **Samuels v. State**, 103 Ga. Appeals 66, 118 S. E. 2nd 231 (1961), as being the only Georgia case in which there has been a construction of this statute. In giving the court the facts in the **Samuels** case in order to try and place it within

the bounds of **Garner v. Louisiana**, 368 U. S. 157, 7 L. Ed. (2) 207, Petitioners left out what was said on page 66 which came after the fact was shown that they had sat down at the lunch counter that had been customarily reserved for white people only. "The personnel of the store informed the defendants that the lunch counter was closed, the lights over the counter were extinguished and the defendants were refused service. This action was taken because they were Negroes." In their opinion the court said (page 66), "Several witnesses testified that in their opinion the presence of the defendants at the lunch counter would tend to create a disturbance." A reading of the record in the Georgia Court of Appeals (Transcript of Record, page 19) showed that the witnesses referred to were the employees of the store, one of whom was a Mr. Tyson, who stated, "We had closed the counter and were no longer serving at that lunch counter. Ordinarily we would not have closed it up at that time of day. It would have remained opened normally until 10:00 that night and it was a result of the defendants being at the counter that we closed it." It was this witness's opinion that the defendants were creating a disturbance. Mr. Kline, the Manager, also stated that he wanted to keep the counter closed as long as there was any disturbance and he considered this a disturbance (Ga. Court of Appeals, Transcript of Record, page 20).

It is significant that Samuels was represented by the same attorneys who represent the Petitioners in this action and that they did not make any suggestion that the statute was unconstitutional.

As the respondent understands the argument of the petitioners, they are not arguing that the statute was unconstitutionally applied to them but that the statute itself is unconstitutional as being too vague and indefinite.

We, therefore, cite to the court the case of **Chaplinsky v. New Hampshire**, 315 U. S. 568, 86 L. ed. 1031, which involved a statute whose stated purpose was to preserve the public peace. The court on page 573 stated "The statute, as construed, does no more than prohibit the face to face words plainly likely to cause a breach of the peace by the addressee." The Petitioner in that case was claiming that the statute was limiting his freedom of speech. This court held that such a statute was not so vague and indefinite as to contravene the Fourteenth Amendment.

The case of **Fox v. The State of Washington**, 236 U. S. 273, 59 L. ed. 573 (1914), involved a violation of a Breach of the Peace statute. The highest court in the state of Washington held that the statute was not bad for uncertainty. This court, page 277, said, "We understand the State Court by implication, at least, to have read the statute as confined to encouraging an actual breach of law. Therefore, the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail."

We cite to the court a decision of the Court of Appeals of New York, **People v. Galpern**, 259 N. Y. 279, 181 N. E. 572, in which that court held: "The record shows that the arrest arose out of a dispute, conducted on each side quietly and without disorder, between a citizen, in this case a member of the bar, who asserted a right to stand upon the sidewalk of a street in quiet, orderly conversation with a group of friends, and a police officer, who asserted a right to direct, those who use the sidewalk to 'move on' when in his opinion they were obstructing the sidewalk." The defendant was convicted of a Breach of the Peace for failing to move on. The question involved is very much similar to the question involved here. On page 573 the court held "Even if we should find that the police officer's interference was unnecessary, and, in the circumstances,

ill-advised, we could not find that it was unauthorized. The defendant, knowing the character and standing of his group of friends and that they would not willingly annoy or offend others, might conclude that the interference was officious; the police officer without such knowledge might conclude that it was a useful precaution to avoid possible disturbance. The law authorized the officer to use his judgment. Friends may congregate on the sidewalk in an orderly group for a short conversation, without creating disorder or unduly offending or obstructing others, but they must 'move on' when a police officer so directs for the purpose of avoiding possible disorder which otherwise might ensue. The Legislature has provided that failure to obey such direction in itself is disorderly conduct. That provision tends to preserve public order on the streets of a great city."

Petitioners' brief argues that the determination of a **purpose** to disturb the public peace is left entirely to the discretion of the police, the courts and the jury (Brief of Petitioner, page 13). The question is now asked Petitioners: To whom would they suggest such a question should be left if not to the police, the courts and the jury? There are many cases where a jury and the courts must determine questions of this character as, for instance, "intent" and "malice".

The Petitioners in their brief, page 14, further state, "If the statute is considered without the benefit of the construction given it in the Samuels case, supra, it could not be known whether the law covered peaceful and orderly acts or merely outwardly disorderly conduct." This statement answers itself in that the petitioners recognize that the Samuels case had previously been decided and had construed the act so that they are unable to state that they were not aware of its construction.

This court has again recently held in the case of **Garner v. Louisiana**, 368 U. S. 157, 7 L. ed. (2) 207, at 216, "We are aware that the Louisiana courts have the final authority to interpret and where they see fit, to reinterpret that state's legislation." That case also involved the interpretation of a breach of the peace statute. This court on page 215 said, "We, of course, are bound by a state's interpretation of its own statute and will not substitute our judgment for that of the state's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court."

The Petitioners have widened their argument from that stated in its original heading to the further point that the petitioners say that they were arrested solely because they were Negroes. During the trial of the case and on appeal below, petitioners consistently argued that they had gone there merely to play basket ball; whereas, the State of Georgia attacked the bona fides of this statement. At last on page 15 of Petitioners' Brief they admit that it may be regarded as "a profound, nonverbal expression of the impropriety of racial segregation in public parks". They then argue that this demonstration was within the range of freedom of speech as assured by the Fourteenth Amendment.

Surely taking over the playground does more than express their views and is similar to the sit-down strikes. The reasoning employed by the court in **National Labor Relations Board v. Fansteel Metal Corporation**, 306 U. S. 240, 83 L. ed. 627, expresses the feeling that is applicable to this case. At page 253 this Court said, "The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant."

The State of Georgia is not denying the right of Petitioners to play upon public playgrounds. There is no evidence to support a finding that if the children weren't assigned the playground, the Petitioners could not have played. What Petitioners want this court to do is to overlook any and all other evidence in this case except that they were Negroes and that they were arrested.

There is no evidence to support such a statement as a "white basket ball court". That would mean a basket ball court reserved exclusively for whites. What the testimony does show (R. page 44) is that there are playgrounds in white areas and playgrounds in colored areas (R. page 44). Mr. Hager, Superintendent of the Recreational Department, testified that they tried to establish them in that manner, that there are two playgrounds that are in mixed areas. One of them being in Park Extension and the other in Wells Park (R. page 42). Mr. Hager further testified, "It has occurred, from time to time, that colored children would play in the Daffin Park area and in the Park Extension area, but no action had been taken **because it is legal**, it is allowed, and nobody has said anything about it" (emphasis ours) (R. page 43).

Officer Hillis stated, "There have been colored children in Daffin Park, but I did not arrest those children, but I arrested these people because we were afraid of what was going to happen. Colored children have played in Daffin Park and they have fished there" (R. page 42).

The Petitioners on cross-examination sought to develop that one of the reasons the Petitioners were arrested was because they were Negroes. This fact, in the policeman's eyes, added an additional reason for asking the Petitioners to leave since they had taken over the childrens' playground in an area surrounded by whites and there

was, therefore, more cause to recognize a possible disturbance. The Petitioners themselves now admit that maybe they weren't there to play basket ball but that they were there to put on what they called a demonstration.

The fault in the Petitioner's reasoning is that they have not shown that the park was segregated but the state on its own volition went out of its way to show that it was not segregated, as witnessed by the testimony of Mr. Hager, the Superintendent of Playgrounds. In trying to demonstrate their right to play, the Petitioners took away the rights of those for whom the playground had been set aside at that time.

The Petitioners have not shown that the exclusion of adults from the playground during these hours was an unreasonable exercise of discretion by the playground authorities. Petitioners by their precipitate action which they classify as a protest (Brief of Petitioners, page 22) could easily have inflamed the public. This court has held that park segregation is unlawful and rights of minorities are to be protected but with a right goes a corresponding duty that is to obey all reasonable requests of a police officer. As was said by Judge Lehman writing for the New York Court of Appeals in **People v. Galpern**, 259 N. Y. 279, 181 N. E. 572, "Failure, even though conscientious, to obey directions of a police officer, not exceeding his authority, may interfere with the public order and lead to a breach of the peace."

ARGUMENT II.

Petitioners Further Argue That the Judgment Below Does Not Rest Upon Adequate Non-Federal Grounds for Decision.

In their argument, Petitioners apparently expand this point to include the same point that is included in and argued under Argument I above. This is indicated by their first statement under Argument II, in which they state: "Initially it should be emphasized that the court below indisputably **did** consider and reject petitioners' due process claim under the Fourteenth Amendment . . . by asserting: 'However, by applying the well-recognized principles and applicable tests above-stated, we find no deprivation of the defendants' constitutional rights under the Fourteenth Amendment of the United States Constitution'." A careful reading of the decision below shows the statement attributed to the court below was in conjunction with their discussion relating to whether the statute, under which the Petitioners were convicted, was so vague the Defendants were not placed on notice as to what criminal act they committed. As was stated above, this point was covered in Argument I and for that reason will not here be gone into again.

The Petitioners here present the question of whether the court below followed its set rule in treating as abandoned any assignments of error not insisted upon by counsel in their briefs or otherwise. Here the discussion deals with the two assignments of error treated by the court below as abandoned. In the Petitioner's bill of exceptions to the court below these two assignments of error were on the judgment sentencing each petitioner (fourth ground) and on the denial of their motion for a new trial (third ground). In reference to these two

grounds in the court below the Petitioners cited no authority, made no argument or even a statement that such grounds were still relied upon. In view of the foregoing, the court below applied the applicable rule as laid down in **Henderson v. Lott**, 163 Ga. 326 (136 S. E. 403), and other cases cited in their decision and therefore correctly treated the questions as abandoned (R. 54).

We recognize that this Court will inquire into the adequacy of a decision on state procedural grounds to determine whether the procedural application involved was inconsistent with prior decided cases. **Staub v. City of Baxley**, 355 U. S. 313. Even in the face of the above clear rule the Petitioners have not cited to this Court one Georgia case to show that the rule laid down in **Henderson v. Lott**, supra, has been inconsistently applied.

Petitioners have apparently conceded that the above Georgia procedural rule has been consistently followed and therefore have attempted to show that the court below should be reversed for two reasons as follows:

1. "The court below did not exercise due regard for the general doctrine that every reasonable presumption is to be indulged against the waiver of a constitutional right."

2. In certain cases this Court has found refusals to pass upon federal issues to be unreasonable for reasons other than inconsistent procedural application.

The only case Petitioners cite as supporting the first of the above two reasons is **Glasser v. United States**, 315 U. S. 60, 70. The **Glasser** case in no way deals with the determination of a procedural question by a state court, but rather concerns itself in the referenced part with the appointment of specific counsel to assist Defendant in U. S.

District Court over his objection to the appointment. The holding of the case on this point is clearly stated on page 70. "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights."

We again reiterate that such is not the case here as the Petitioners had representation by counsel in the court below, to which representation they had expressed no objection.

The Petitioners next base their claim for reversal on what they allege to be an unreasonable refusal to pass upon federal issues.

We ask, is it unreasonable to be consistent? To ask the question is to answer it in that inconsistency would lead to uncertainty and to a lack of knowledge on how to protect one's rights.

Under the procedural rule involved all that is required is an insistence on the position taken, that is, let the court know what position is taken by argument on the question or by covering the question in the brief or by stating the assignment of error is insisted upon by counsel.

Petitioners say the above requirement is unreasonable under the decisions of this court in **Staub v. Baxley**, 355 U. S. 313; **Terre Haute I. R. Co. v. Indiana**, 194 U. S. 579, 589; **Union P. R. Co. v Public Service Commission**, 248 U. S. 67.

These cases are clearly distinguishable from the principle presented in this case. The **Union Pacific Railroad Company** case dealt with the question of whether a constitutional right had been waived by complying with the unconstitutional statute. This court in taking jurisdiction

predicated its action in doing so on duress by the State, which we submit is not an issue in the current case for Petitioners were afforded every opportunity to present and argue their case.

Terre Haute Railroad Co. also concerns a point not at issue here, i. e., untenable construction of a charter granted by the State and thus evading the Federal question.

In the **Staub v. City of Baxley** case this court found the non-federal grounds to be without any fair or substantial support and plainly untenable in that the Georgia court did not follow a long line of its own decisions in determining the procedural matter. The converse is true in the present case (R. 54).

Lawrence et al. v. State Tax Commission of Mississippi, 286 U. S. 276, cited by the Petitioners, simply held that the purported non-federal ground put forward by the state court for its refusal to decide the constitutional question was unsubstantial and illusory. Which is clearly not the same as the case now before this court.

The decision in the court below does not impede the assertion of federal rights, nor is it burdensome to require insistence upon the grounds of appeal. Furthermore, it is clearly shown that the rule of the court below to treat as abandoned points not insisted upon has been consistently applied.

It has been held many times by this court that a State Court has the power to decide the proper method of preserving Federal questions and such determination will bind this Court. **Herdon v. Georgia**, 295 U. S. 441; **Parker v. Illinois**, 333 U. S. 571; **Edelman v. California**, 344 U. S. 357; **Michel v. Louisiana**, 350 U. S. 91. In all of these cases this Court deferred to a state court's determination of its own procedural rules.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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